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CANADIAN JUDICIAL COUNCIL

A Place Apart:

Judicial Independence and Accountability in Canada

**A Report prepared for the Council
by**

Martin L. Friedland



A Place Apart



A PLACE APART: JUDICIAL INDEPENDENCE AND ACCOUNTABILITY IN CANADA

by

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A REPORT PREPARED FOR THE CANADIAN JUDICIAL COUNCIL

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The conclusions and interpretations are those of the author and do not necessarily reflect the views of the Canadian Judicial Council.

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PREFACE

Senator Arthur Meighen stated in the Senate in 1932 that “a judge is in no sense under the direction of the Government...The judge is in a place apart.”¹ The phrase “a place apart” captures a sense of the independence necessary to the position of the judiciary in society. The “place” has a solid historical foundation, built up over the centuries, and a fine edifice. Canadians are rightly proud of their judiciary. Foreign observers look with envy on the judiciary in Canada. As with all institutions in society, however, the judiciary is properly coming under increased scrutiny. There are demands by society for greater accountability in all public institutions. The power given to the judiciary in 1982 by the Canadian Charter of Rights and Freedoms² has increased society’s interest in the judiciary. This Report suggests a number of ways in which the judiciary and those responsible for appointing members of the judiciary can develop techniques of accountability that are consistent with judicial independence. Accountability can, in fact, enhance the public’s respect for independence. The relatively modest renovations in the structure suggested in this document will help keep the judiciary a strong, respected, and independent institution.

I was asked by the Canadian Judicial Council to undertake this study in early 1993. The Council is a statutory body composed of all 35 federally appointed chief justices and associate chief justices in Canada. From the outset, it was agreed that it would be a wide-ranging analysis of the many issues that come within the scope of the twin concepts of judicial independence and accountability. An early description from the Council stated:³

Some of the many topics to be studied are the effect of the Charter of Rights and Freedoms on judicial independence; whether judicial independence should be further constitutionalized; techniques for selecting judges; confirmation hearings; the role of chief justices; the role of the judiciary in the administration of the courts; the composition and functioning of judicial councils; the relationship between provincial and federal judicial councils; the disciplining of judges; performance evaluations; setting remuneration; and retirement policy.

Many of the issues are interrelated. The quality of appointments affects discipline, and pension policy affects appointments, to give two examples. The study is not restricted to the issues involving the approximately 1,000 federally appointed judges, but includes as well issues relating to the more numerous provincially appointed judges. The public, for the most part, does not distinguish clearly between the two types of appointments.

A very large number of persons and institutions assisted me with my work. The Canadian Judicial Council, particularly its Judicial Independence Committee, chaired by Chief Justice Richard Scott of Manitoba, was always helpful and supportive. I met on a number of occasions with the members of the Judicial Independence Committee and a high-powered subcommittee of that committee, composed of Chief Justices Allan

McEachern of British Columbia, Pierre Michaud of Quebec, Roy McMurtry of Ontario, and Richard Scott of Manitoba. The good thing about working with a committee called the Judicial Independence Committee is that they are sensitive to the importance of respecting academic independence. I enjoyed the lively interchanges with that group, and it is probably safe to say that not one of them agrees with all my recommendations. I am also indebted to the Chief Justice of Canada, Antonio Lamer, the chair of the Canadian Judicial Council, for his support and encouragement, as well as for ideas expressed in a number of lengthy discussions. Finally, Jeannie Thomas, Executive Director of the Council, took an active interest in all aspects of the project, from the initial stages to the physical production of the Report, including its translation into French. Her knowledge, acquired from her almost 10-years' work with the Council, was invaluable to me in preparing the Report.

Judges, government officials, court administrators, lawyers, academics, and others with an interest in the administration of justice were consulted throughout the period I have been engaged in the study. They are too numerous to name and, indeed, some may not wish to be named. In the spring of 1994, I visited every jurisdiction in Canada. There was a great amount of interest in the study and generous cooperation from every person with whom I met. In most jurisdictions, separate meetings were arranged with federally appointed chief justices, provincially appointed chief judges, federally appointed puisne judges (that is, non chief justices), and provincially appointed puisne judges. In the end, I met personally with just about every chief justice and chief judge in Canada and well over 200 puisne judges.

I also met with government officials in every jurisdiction, usually the deputy minister and one or two others involved with judicial affairs. As in the meetings with the judges, the information and ideas I obtained were invaluable to my understanding of how things now work and how they could be improved. Improvement did not necessarily have the same meaning for the government officials as for some members of the judiciary. Again, I will not single out particular individuals, with the exception of a few persons at the federal level. The study had the active support of the federal Department of Justice. John Tait, the former Deputy Minister of Justice, took a genuine interest in my work from the beginning and was always available to discuss ideas with me. His successor, George Thomson, has continued the interest he had demonstrated in a number of meetings I had with him in his former position as Deputy Attorney General of Ontario. I am also grateful to Andrew Watt, the head of the Judicial Affairs Unit in the Department of Justice, and other members of the Unit for sharing their ideas with me and for responding to my many requests for information. Similarly, Guy Goulard, Commissioner for Federal Judicial Affairs, and his predecessor, Pierre Garceau, were always willing to assist me with my work.

Lawyers' organizations across the country were also helpful, adding perspectives on the issues not always shared by the judges and government officials. The Federation of Law Societies of Canada and the Canadian Bar Association helped set up meetings with lawyers across the country. Again, I will not mention specific individuals, with the exception of Paul Beckmann, the former president of the Federation of Law

Societies of Canada, Cecilia Johnstone, the former president of the Canadian Bar Association, and Thomas Heintzman, currently the head of the organization. The Canadian Bar Association is at present debating a number of the issues dealt with in this Report, and discussions with its representatives were useful to me and, I believe, to them.

The last group that should be singled out are academics. The two foremost Canadian academic experts on the judiciary are Professor Peter Russell of the University of Toronto and Professor Carl Baar of Brock University. From the outset, they helped me shape the study, shared their extensive libraries with me, and read drafts of my chapters. I am greatly indebted to them. I met with other academics in the course of my study, many of whom commented on drafts of my work. I am indebted to the following persons (from west to east): Professor Alan Cairns and Dean Lynn Smith of the University of British Columbia, Professor Gerald Gall of the University of Alberta, Professors Trevor Anderson and Clifford Edwards of the University of Manitoba, Professor Peter Hogg of Osgoode Hall Law School, Professors Martha Jackman and William Kaplan of the University of Ottawa, Dean Wade MacLauchlan of the University of New Brunswick, and Professor Wayne MacKay of Dalhousie University. I also had helpful discussions with many of my colleagues in the Faculty of Law at the University of Toronto. Two former academics require special mention. I was pleased to have had the then Deans James MacPherson of Osgoode Hall Law School and Robert Sharpe of the University of Toronto Faculty of Law as special consultants. They helped define the scope of the study and offered sound advice on many of the issues I was dealing with. Their involvement necessarily decreased when each in turn was appointed to the bench. Professor Thomas Cromwell of Dalhousie University, the present executive legal officer of the Supreme Court of Canada, also assisted as a consultant and made many helpful observations and suggestions on my drafts.

Many other persons and organizations assisted me. In particular, I would like to thank Mr. Justice Bruce Cohen of British Columbia, the president of the Canadian Judges Conference, and others from the Conference; members of the Canadian Council of Chief Judges; officers of the Canadian Association of Provincial Court Judges; Judge Michèle Rivet, the president of the Canadian Institute for the Administration of Justice; Judge Dolores Hansen of the National Judicial Institute; and persons connected with the Western Judicial Education Centre. I spent some time in England and was assisted by a number of very knowledgeable and helpful persons there, including the Lord Chief Justice, Peter Taylor; Justice Henry Brooke, the chair of the Law Commission; barristers Anthony Bradley and David Pannick; Ian Scott of Birmingham University and Robert Stevens of Oxford University; and the following very helpful experts from the Lord Chancellor's Department: Nick Chibnall, Bernadette Kenny, Helen Tuffs, and David Staff. In the United States, I was greatly assisted by Russell Wheeler, the Deputy Director of the Federal Judicial Center, and Jeffrey Barr, Assistant General Counsel, Administrative Office of the U.S. Courts, Washington; by Cynthia Gray and Lisa Milord of the American Judicature Society, Chicago; and by other helpful persons from the National Center for State Courts, Virginia, and the American Bar Association.

Chicago. I was also assisted at a very early stage of the study by Professor Ernest Friesen of California Western Law School, San Diego.

Many of the persons mentioned in the preceding paragraphs, as well as many unnamed judges, lawyers, government officials, and others, read confidential drafts of parts of the document. Their thoughtful comments greatly assisted me in preparing this final document.

I leave to the end my thanks to four remarkably able research assistants and to an excellent secretary. At the very early stages, I was assisted by Jeffrey Piercey, now practising law in Calgary, and at the very final stages by Gillian Roberts, now with the Crown Law Office in Toronto. In between, Poonam Puri and Caroline Ursulak, who have just graduated from the Faculty of Law, did excellent work on the project. I could not have asked for better research assistants. Finally, I am greatly indebted to the secretarial skills of Marlene Haughton, who typed the entire manuscript and, even though she had moved on to a more senior administrative position at the Law School, did all the final revisions.

To all the above persons and organizations, I am very grateful. The ideas expressed in this Report are, of course, my own and do not necessarily reflect the views of the Canadian Judicial Council or any other body.

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May, 1995

CHAPTER ONE: INTRODUCTION

1. INDEPENDENCE AND IMPARTIALITY

Independent and impartial adjudication is essential to a free and democratic society. As a Canadian Senator stated in a debate in 1894: “The safety and happiness and peace of every community depend largely on the confidence that people have in the judiciary. People should feel that their rights are safe under the law, and that the judiciary give wise and impartial judgments.”¹ The Senator was echoing a view expressed two centuries earlier by John Locke that the availability of impartial judges to settle disputes was the most fundamental reason for persons to quit the state of nature and live under civil government.²

Chief Justice Antonio Lamer expressed the issue this way in a recent speech to the Canadian Bar Association:³

The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone’s rights and freedoms. We cannot expect judges to be superhuman; we can expect them to be as impartial as it is humanly possible to be, and to allow them, indeed require them, to work in institutions where the conditions promote and protect that impartiality. Otherwise, how could the system work? How could the accused get a fair trial if the judge is not independent and seen to be independent of the prosecution? How could one government in a dispute with another have confidence in the judge in absence of actual and perceived impartiality? Judicial independence is, at its root, concerned with impartiality, in appearance and in fact. And these, of course, are elements essential to an effective judiciary. Independence is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.

Independence is particularly important in a federal system. As former Chief Justice Brian Dickson stated: “Canada is a federal country with a constitutional distribution of powers between federal and provincial governments. As in other federal countries, there is a need for an impartial umpire to resolve disputes between two levels of government as well as between governments and private individuals who rely on the distribution of powers.”⁴

There is no dispute about the importance of impartiality and independence amongst Canadian constitutional law scholars. Peter Hogg, for example, states that “it is inherent in the concept of adjudication, at least as understood in the western world, that the judge must not be an ally or supporter of one of the contending parties.”⁵ And Peter Russell, following Locke, makes the same point: “If government is to be based on the rational consent of human beings, adjudication by impartial and independent judges must be regarded as an inherent requirement of political society.”⁶ Many years ago, R. MacGregor Dawson stated simply and wisely that the judge should be “placed

in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong; and there is therefore every reason to hope that his best efforts will be devoted to the conscientious performance of his duty.’’⁷ Again, Professor Lederman put the same point this way: ‘‘The conditions on which [judges] hold office mean that they have no personal career interest to be served by the way they go in deciding cases that come before them.’’⁸

In the following chapters, we explore various aspects of judicial independence. Mr. Justice Gerald Le Dain in the important 1985 Supreme Court of Canada case of *Valente*⁹ referred to three crucial aspects of independence: security of tenure, financial security, and institutional security. If judges do not have security of tenure, then there is a danger that they will tailor their rulings to please the person who can terminate their position. If judges do not have financial security, then they may be tempted to accept favours or the promise of future favours from those who have an interest in the litigation. And if judges do not have a measure of institutional independence over at least the exercise of the judicial function, then the government can, for example, control which judges will hear which cases.

The judiciary plays a very major role in Canadian society in resolving disputes and, particularly under the Charter, in developing the law. Large amounts of public resources are expended on the judicial enterprise. Money that is spent on the judiciary is necessarily not spent on other worthy endeavours. Society therefore has a legitimate interest in ensuring that the judiciary collectively and individually acts wisely, properly, and efficiently—as well as impartially. Of course, there is now a large amount of accountability built into the judicial system. Judicial proceedings are, except in exceptional circumstances,¹⁰ open to the public and the press. Few institutions operate so openly. And judgments are, for the most part, subject to appeal to a higher court.

A number of chapters of this Report explore in detail various ways in which we can achieve greater accountability. At the same time, it is recognized that accountability can potentially have an undesirable chilling effect on a judge’s obligation to rule according to the law. This Report examines ways of achieving a proper balance between accountability and independence.¹¹ Chapters 3 and 4 discuss security of tenure and financial security. Chapter 5 looks at the subject of discipline, and chapter 6 at codes of conduct. The two following chapters examine the subjects of evaluation and education. Techniques for effectively managing the courts are explored in chapter 9, and the role of the chief justice is looked at in chapter 10. In chapter 11, appointments and elevations are discussed. Finally, a concluding chapter draws together some of the ideas expressed in earlier parts of the Report.

Let us first examine a number of background matters. We start with a brief history of judicial independence.

2. BRIEF HISTORY OF JUDICIAL INDEPENDENCE

In this section, we examine very briefly the history of judicial independence in England, the United States, and Canada. No attempt will be made to be comprehensive. Only the barest outlines are given.

A. England

Until the seventeenth century, the English courts were the King's courts, and as a rule the judges served at the good pleasure of the Crown (*durante bene placito*) and could therefore be dismissed without cause.¹ The clash between the Chief Justice of the King's Bench, Sir Edward Coke, and the Attorney General, Francis Bacon, in the early part of the seventeenth century was the most dramatic challenge to this position. Bacon argued that judges were "lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."² Coke took the position, in contrast, quoting Bracton, that "the King is subject to God and the law." Coke nevertheless was dismissed from office in 1616 by James I.³

After the "Glorious Revolution" of 1688-89, however, the Crown in fact made all appointments during good behaviour (*quam diu se bene gesserint*). Good behaviour had been instituted in 1640 by Charles I and during Cromwell's Commonwealth, but "at pleasure" appointments had been reinstated by Charles II and James II. The important Act of Settlement of 1701⁴ put the practice on a statutory basis, although it did not actually apply until George I, the first of the Hanoverians, took the throne in 1714.⁵ It is not clear why the subject was not included in the 1689 Bill of Rights.⁶ Professor Lederman suggests that its omission was by inadvertence.⁷

The Act of Settlement provided that, from the accession of the House of Hanover, "judges' commissions be made *quam diu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of Parliament it may be lawful to remove them."⁸ The conflict in the seventeenth century had been between the Crown and Parliament. Parliament won and the result was, to quote Robert Stevens, that "the judges, after 1700, were lions under the mace."⁹ But judges could still be dismissed without cause when a new monarch took the throne, and this happened in 1702, 1714, and 1727.¹⁰ An Act passed in 1760, however, provided that judges would continue to hold office during good behaviour, notwithstanding the death of the monarch.¹¹ The Crown still had a complete discretion to grant a judicial pension, but this form of influence was eliminated in 1799.¹²

Another change brought about in the seventeenth century was an improvement of the ethical standards of the judiciary. This occurred from about 1650 onwards.¹³ Indeed, Sir Francis Bacon had been removed as Lord Chancellor for accepting gifts from litigants.¹⁴ A statute passed in the mid-fourteenth century had stated that judges should not "take fee nor robe of any man...and...no gift or reward by themselves, nor by other...of any man that hath to do before them by any way, except meat and drink, and that of small value."¹⁵ The latter could, however, be considerable. A present of a

whole barrel of sturgeon was thought appropriate for the Chief Justice of the Common Pleas in 1534.¹⁶ No doubt, a major factor in changing judicial attitudes towards accepting gifts was the substantial 500 per cent increase in judicial salaries that occurred in 1645. Puisne judges' salaries went from under £200 to £1,000 a year.¹⁷

The 1701 Act of Settlement had, to some extent, been influenced by the ideas of John Locke, who died in 1704. He was the first modern theorist to propound a doctrine of the separation of powers and he advocated a separation between the judiciary, the executive, and Parliament.¹⁸ The 1701 Act had, in fact, excluded government ministers and others who "have an office or place of profit under the King [from] serving as a member of the house of commons."¹⁹ Subsequent legislation, as we know, changed this to the present system, whereby cabinet ministers sit in the House, and the government normally controls the House.²⁰ Further, the separation between the judiciary and the other branches was not as pure as Locke might have wished. Even some of the judges were members of the Cabinet. Chief Justice Mansfield, for example, sat as a member of the Cabinet for about nine years (1757-1765) and Chief Justice Ellenborough, the last judge to sit in the Cabinet, apart from the Lord Chancellor, was a cabinet member in the early nineteenth century. Some judges also sat in the Commons. The Master of the Rolls continued to sit in the Commons until the Judicature Acts of the 1870s.²¹

B. United States

Locke's writing and, particularly, Montesquieu's *Spirit of the Laws*, which appeared in 1748, were, however, very influential in the newly created United States of America.²² Montesquieu wrote:²³

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Before the American Revolution, colonial judges generally served at pleasure.²⁴ One of the complaints in the Declaration of Independence was that George III "made the judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."²⁵ So, for example, we find that the Declaration of Rights of the Massachussets Constitution of 1780 stated:²⁶

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the

laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that judges of the supreme judicial court should hold their office as long as they behave themselves well; and that they should have honourable salaries ascertained and established by standing laws.

And James Madison stated in 1788 in the Federalist papers: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny...[T]he preservation of liberty requires that the three great departments of power should be separate and distinct.”²⁷ The Constitution that emerged from the Federal Convention of 1787 adopted this approach. Article III, section 1 states:²⁸

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

C. Canada

As in colonial America, the judges in British North American colonies held office at pleasure. The judicial independence parts of the 1701 Act of Settlement were not applicable in the colonies.²⁹ There was, however, some considerable protection because in 1782 a U.K. statute provided for review and confirmation by the Privy Council of any proposal by a colonial governor and council to dismiss colonial judges.³⁰ Lederman documents two cases in which a judge was dismissed, one by the King in 1806 and one by the Privy Council in 1829.³¹ Further, judges were members of the executive council³² and even of the assembly, although membership in the latter ceased in 1812 in Lower Canada and later in Upper Canada.³³ And they would often give secret advisory opinions.³⁴

A recent book by Murray Greenwood on Lower Canada, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution*,³⁵ convincingly demonstrates that the Quebec judges were Baconian “lions under the throne.”³⁶ Chief Justice William Osgoode of Lower Canada, for example, was actively involved in both prosecuting and hearing the treason trial of McLane in 1797, who was later hanged.³⁷ Greenwood shows that fear of the French Revolution being carried over to Canada produced a “garrison mentality”. He argues that “with some few exceptions...Baconianism characterized the Lower Canada Bench down to at least 1839.”³⁸ Upper Canada judges, if not actually “under the throne” during this period, were not far away from it.³⁹

The first statutory requirement for judicial tenure during good behaviour in British North America was for the King's Bench in Upper Canada in 1834.⁴⁰ A similar statute for Lower Canada and for other Upper Canada courts was not passed until 1843, after the unification of Upper and Lower Canada in 1840.⁴¹ Lord Durham's report of 1839 had recommended unification and also that "The independence of the judges should be secured, by giving them the same tenure of office and security of income as exist in England."⁴² Further, about 1830, the Colonial Office had made it clear that henceforth they would no longer appoint judges to the executive or legislative councils.⁴³

3. THE BRITISH NORTH AMERICA ACT

The British North America Act, 1867, now the Constitution Act,¹ adopted for the new Confederation the judicial independence features that had been introduced in Canada in the earlier decades. The provisions dealing with independence appear to have been non-controversial. The real controversy centred on whether the present section 96 appointing power should be in the hands of the central government² and, to a lesser extent, whether there should be a federally established Supreme Court of Canada.³

At the Quebec Conference of 1864, Sir John A. Macdonald moved, and the Conference adopted, the following resolutions:⁴

That the Judges of the Courts of Record in each Province shall be appointed and paid by the General Government, and their salaries shall be fixed by the General Legislature.

...

That the Judges of the Superior Courts shall hold their offices during good behaviour, and shall be removable only on the address of both Houses of the General Legislature.

The statute that was eventually enacted as the British North America Act in 1867, after further discussion at the Quebec Conference of 1864 and the London Conference of 1866, stated:⁵

99. The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons.

100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts...shall be fixed and provided by the Parliament of Canada.

There were, of course, a number of intermediate drafts between the first resolution and the final Act, but in my view they were small drafting changes and no major change in substance was contemplated.⁶ Some of the minor changes, which are easily understood, were to make the central government responsible for allowances and pensions, as well as salaries; to spell out precisely what courts were included in the federal government's responsibility; to substitute the words "fixed and provided" for the word "fixed"; and to substitute the words "but shall be removable" for the words "and shall be removable only". The last change might suggest that other forms of removal were thereby contemplated, but there is nothing in the various debates and memoranda to suggest that. It appears to be just a drafting change.

The only constitutional amendment to these provisions was in 1960, when a further clause was added to section 99, making retirement at age 75 compulsory for all superior court judges.⁷

The preamble to the Act, which states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom", is also sometimes used to bolster judicial independence. Dickson C.J.C., for example, stated in *Beauregard*: "Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble."⁸

The three key sections of the Constitution Act—sections 96 (the appointing power), 99 (hold office during "good behaviour"), and 100 (salaries "fixed and provided")—were referred to by Lord Atkin in a 1938 Privy Council case as "three principal pillars in the temple of justice" and, he went on to say, "they are not to be undermined".⁹

4. CHARTER AND OTHER CONSTITUTIONAL CASES

The Canadian Charter of Rights and Freedoms contains a specific reference to judicial independence. Section 11(d) states that a person "charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." The section applies to those "charged with an offence", and this encompasses criminal and quasi-criminal charges.¹ Section 7 could also be used: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." But in most cases, as Lamer C.J.C. pointed out in *Généreux*, "s. 7 does not offer greater protection than the highly specific guarantee under s. 11(d)."² The discussion that follows will concentrate on Supreme Court of Canada cases.

A. Canadian Bill of Rights

The words "by an independent and impartial tribunal" were also found in the 1960 Bill of Rights.³ Section 2(f) provides that "no law of Canada shall be construed and

applied so as to...deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to the law in a fair and public hearing by an independent and impartial tribunal..." These words were, in turn, borrowed directly from the 1948 United Nations Universal Declaration of Human Rights, article 10 of which states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."⁴ The U.S. Bill of Rights does not have a provision dealing directly with independence and impartiality. The clear separation of powers in the Constitution apparently made it unnecessary.

There were very few cases in which the words "independent and impartial tribunal" were the subject of controversy under the 1960 Bill of Rights. Walter Tarnopolsky's 1975 edition of *The Canadian Bill of Rights* cites no cases; he devoted three lines to the subject, stating: "Section 2(f) also speaks of 'an independent and impartial tribunal'. This issue arises less often in the criminal process than in administrative procedure."⁵ He then went on to discuss natural justice in administrative law. One subsequent Bill of Rights case was the *MacKay* decision in 1980,⁶ in which the Supreme Court of Canada in a (7-2) decision held that a military Standing Court Martial did not contravene the requirement for "an independent and impartial tribunal". That issue under the Charter will be canvassed later in this section.

There have, in contrast, been four major Supreme Court of Canada cases relating to s. 11(d) with respect to the words "independent and impartial tribunal". Let us examine those cases as well as two other non-Charter cases decided by the Supreme Court of Canada dealing with judicial independence. These six cases will also, of course, be discussed in the appropriate places in subsequent chapters.

B. *Valente* (1985)⁷

The first case—and the most important—is *Valente*. Within a year after the Charter was enacted, a challenge was made to the independence of the Ontario Provincial Court bench. There were 18 grounds alleged for holding that the judge was not independent. Many of these involved differences from federally appointed s. 96 judges. Salaries, for example, were determined by the executive branch and not by the legislature as with s. 96 judges. And salaries and pensions were not, as with s. 96 judges, a charge on the consolidated revenue fund. Further, removal of a provincial court judge did not, as with s. 96 judges, require a vote by the legislature.

As mentioned above, this is not the place for a thorough analysis of the specific aspects of the case. It will be discussed in the appropriate place in later chapters. However, a number of points should be made here. The test adopted by Mr. Justice Le Dain, who wrote the unanimous judgment for the Court, was "whether the tribunal may be reasonably perceived as independent."⁸ This is the same test as had been and is used for bias or impartiality⁹ and had been used by the Ontario Court of Appeal in *Valente*.¹⁰ Le Dain J. implicitly adopted Howland C.J.O.'s version of the test:¹¹

The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that a provincial court judge sitting as [the judge was in this case] was a tribunal which could make an independent and impartial adjudication.

The Supreme Court dismissed the accused's appeal, thereby agreeing with Howland C.J.O. that "the concerns raised by counsel for the respondent neither singly nor collectively would result in a reasonable apprehension that would impair the ability of [the judge] to make an independent and impartial adjudication."¹²

Le Dain J. drew a distinction between independence and impartiality, a distinction that had not been made by the Court of Appeal. Although conceding that "there is obviously a close relationship between" the two, Le Dain J. went on to say that "they are nevertheless separate and distinct values or requirements."¹³ To Le Dain, "impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case." The word independent, however, "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of the government, that rests on objective conditions or guarantees."¹⁴

Although these definitions appear reasonable, it would probably have been better not to have drawn too refined a distinction between the two concepts and instead to have treated them together. After all, the section is applicable only with respect to criminal charges, where the Crown is almost always a party. Thus, if there is a reasonable apprehension of a lack of independence in a criminal case, there would at the same time surely also be a reasonable apprehension of a lack of impartiality.¹⁵ As Lamer C.J.C. stated in the later case of *Lippé*:¹⁶ "Judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality." Or as Russell Osgood recently stated, "the two concepts are inseparable."¹⁷ Impartiality is in this context wider than independence in that a tribunal can be independent and yet biased against one of the parties. But it is hard to know how a tribunal in a criminal case can lack independence and yet be impartial. Perhaps the reason the court focused only on independence is that they did not want to accuse the judge in question of actual partiality or even the appearance of partiality. We will return to the distinction between the two concepts in the discussion of *Lippé*, below.

In *Valente*, Le Dain J. then discussed three "essential conditions of judicial independence for purposes of s. 11(d) of the Charter."¹⁸ These, in Le Dain's view, are security of tenure, financial security, and "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial functions."¹⁹ He did not demand that the provinces follow the standards applicable to federally appointed superior court judges. He adopted a much more flexible approach,²⁰ "which may have to be applied to a variety of tribunals"²¹, and stated:

“The standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions. It must necessarily be a standard that reflects what is common to, or at the heart of, the various approaches to the essential conditions of judicial independence in Canada.”²²

As to security of tenure, Le Dain J. held that while the Ontario provision “falls short of the ideal or highest degree of security,”²³

It reflects what may be reasonably perceived as the essentials of security of tenure for purposes of s. 11(d) of the Charter: that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11 is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.

One aspect of the Ontario legislation caused Le Dain’s concern: the ability of the executive to continue at pleasure the tenure of a judge after the age of retirement. But this did not affect the tenure of the judge in question. Moreover, Ontario legislation changed the procedure²⁴ as of 1983 to make reappointment subject to the approval of the chief judge of the provincial court, and thus cases decided by such a judge after the amendment would not be suspect.²⁵

With respect to financial security, Le Dain J. stated: “The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.”²⁶ He held that the Ontario provisions “established a right to pension and other benefits which could not be interfered with by the executive on a discretionary or arbitrary basis.”²⁷

Finally, Le Dain J. dealt with institutional independence, which he observed “is a major issue with respect to judicial independence today”²⁸ — and as we will see in chapter 9 of this Report, it still is. Le Dain held that “the essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d)...may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.”²⁹ The Ontario legislation, he held, met that test.

C. *Beauregard* (1986)³⁰

The “judicious self-restraint” — to use Peter Russell’s words³¹ — that was shown in Le Dain’s well-crafted judgment in *Valente* was carried over to the next Supreme Court judicial independence case, *Beauregard*. This case dealt with financial independence under s. 100 of the Constitution. It was not a Charter case under s. 11(d). *Beauregard* was a Quebec court of appeal judge who brought an action for a

declaration that the federal government had no right to enact legislation in 1975 requiring him to contribute to his pension plan. Previously, pensions were non-contributory. The federal government announced before Beauregard's appointment to the bench in June 1975 that it was going to substantially increase judicial salaries and pensions, but would also require contributions from judges towards their pensions. Beauregard was appointed after the enactment of the legislation increasing salaries and pensions, but before the enactment of the legislation making pensions contributory. The contribution was required only for those appointed after the first reading of the pension bill, that is, in February, 1975. (Those appointed before that date had to pay only 1½% of their salaries towards the increase to survivor benefits; those appointed after that date had to pay 7% of their salaries.)

The question was whether Beauregard's contribution violated s. 100 of the Constitution Act: "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts...shall be fixed and provided by the Parliament of Canada." It was argued that Parliament could not impair or diminish the established salary or benefits of incumbent judges because this might interfere in fact, or be perceived as interfering, with the independence of those judges.

Dickson C.J.C. held for the Court that the federal government could constitutionally have imposed the contribution requirement on all judges, whenever appointed. "Canadian judges are Canadian citizens," he stated, "and must bear their fair share of the financial burden of administering the country."³² All the legislation does, he went on, "is treat judges in accordance with standard, widely used and generally accepted pension schemes in Canada."³³ But, Dickson stated, the power of Parliament to fix the salaries and pensions of superior court judges is not unlimited: "If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges vis-à-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be ultra vires s. 100 of the *Constitution Act, 1967*."³⁴

The specific wording of section 100 did not help the plaintiff, wrote Dickson. It is true that pensions were non-contributory in 1867, but, stated Dickson, "The Canadian Constitution is not locked forever in a 119-year-old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people."³⁵ Section 100 uses the words "fixed and provided", but Dickson held that "the word 'provided' does not necessarily mean that Parliament must pay the total cost of judicial pensions."³⁶

The Court was unanimous on the above reasons. There was, however, a 3-2 split on another issue, that is, whether Beauregard was denied "equality before the law and the protection of the law" under the Canadian Bill of Rights.³⁷ Dickson C.J.C. and two other members of the Court held that "in light of the validity of the overall policy reflected in the 1975 amendments and the legality and fairness of Parliament's attempt to protect the settled expectations of incumbent judges, I cannot say that the choice of

February 17, 1975, as the cut-off date was contrary to the Canadian Bill of Rights.’’³⁸ The two dissenting judges would have drawn the line when the pension legislation was enacted, that is, after Beauregard’s appointment.

At the time this is being written, there are at least four judgments across Canada (P.E.I., Alberta, Manitoba, and Saskatchewan)³⁹ dealing with the question of whether provincial court salaries can be reduced to the same extent as those of other persons paid with government funds. These cases will be discussed in chapter 4, but there is no question that *Beauregard* and *Valente* will be drawn on extensively by all counsel on appeal to support their positions.

In Dickson C.J.C.’s general analysis of judicial independence,⁴⁰ there are some statements that will also be widely cited in other cases. One such statement, which will be called in aid to support institutional independence and seems to go further than *Valente*, is the following: ‘‘The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system.’’⁴¹ Further, those who do not like chief justices’ exercising too much control over their activities will cite Dickson C.J.C.’s statement that ‘‘the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure group, individual or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.’’⁴² Another potentially important statement is the broadening of the judicial function to include not only adjudication but the courts’ role ‘‘as protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.’’⁴³

D. *MacKeigan v. Hickman* (1989)⁴⁴

In this non-Charter case, a provincial Commission of Inquiry headed by Chief Justice Hickman of Newfoundland into the Nova Scotia Marshall affair wished to force the Chief Justice of Nova Scotia, MacKeigan, and the four other Court of Appeal judges who had sat on the 1983 reference that freed Donald Marshall, Jr., to give evidence before the Commission. There were three matters that the Commission wished to question the judges about: why Pace J.A., who had been the Attorney General of Nova Scotia at the time of the original trial, had sat on the appeal; what the record on the Court of Appeal reference was; and what factors, in the opinion of the Court of Appeal, constituted a miscarriage of justice (the controversial sentence by the Court of Appeal was: ‘‘Any miscarriage of justice is, however, more apparent than real’’). The five judges sought a declaration that they did not have to testify.

The principal judgment in the case was delivered by McLachlin J., who held that the concept of absolute judicial immunity applied to all three questions. The judgment is, in fact, a narrow one. She based her decision on statutory construction, holding that judicial immunity is so deeply embedded in the common law that the relevant sections

of the Nova Scotia Public Inquiries Act⁴⁵ should not be construed to permit any of the proposed questioning. McLachlin J. spoke for four members of the seven-member Court on this issue.

She did not decide, however, whether, if the section were drafted clearly to give the Commission this power, it would be upheld. McLachlin J. stated:⁴⁶ “I should not, however, be taken as suggesting that a judge could never be called to answer in any forum for the process by which the judge reached a decision or the composition of the court on a particular case.” Then, no doubt thinking of the Canadian Judicial Council, she said: “I leave to other cases the determination of whether judges might be called on matters such as these before other bodies with express powers to compel such testimony and which possess sufficient safeguards to protect the integrity of the principle of judicial independence.” Nor did she decide whether such a statute would infringe the federal power over federally appointed judges.⁴⁷

In spite of the narrowness of the holding, McLachlin J.’s language is sufficiently strong to indicate that an executive or legislatively created commission could not constitutionally compel testimony from judges. She states:⁴⁸

The judges’ right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge...The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard* supports the conclusion that judicial immunity is central to the concept of judicial independence...To entertain the demand that a judge testify before a civil body, an emanation of the legislative or executive, on how and why he or she made his or her decision would strike at the most sacrosanct core of judicial independence.

It is not clear, however, what sections she would use. Section 11(d) of the Charter would not be an issue. Perhaps it would be s. 99⁴⁹ or simply a concept implicit in the Constitution, including its preamble and the Charter.⁵⁰

All the judges hearing the case agreed that absolute judicial immunity would exempt the judiciary “from testifying as to their mental processes in arriving at a judgment or as to how they reached a decision in any case that came before them.”⁵¹ But three judges (Lamer C.J.C., Cory and Wilson JJ.) would as a matter of statutory construction⁵² have given only a qualified privilege relating to administrative matters and two of them (Cory and Wilson JJ.) would have permitted questioning with respect to why Pace J.A. sat on the Court and what constituted the record of the Court.⁵³ “There are exceptional cases,” wrote Cory J., “such as this one where the qualified privilege of immunity from testifying must give way...when it is necessary to reaffirm public confidence in the administration of justice.”⁵⁴

After the Royal Commission reported, as we will see in chapter 5, a complaint was made to the Canadian Judicial Council by the Attorney General of Nova Scotia and a five person public hearing was set up. The Judges Act⁵⁵ states that the Council has “power to summon before it any person or witness and to require him to give evidence on oath.” In a note in the *Canadian Bar Review*, before the C.J.C. hearing, Peter Russell wrote: “Given the purpose of the legislation, only a perversely narrow interpretation would exclude superior courts from the ambit of this provision.”⁵⁶ As it turned out, however, the Inquiry Committee did not compel the judges to testify and they did not volunteer to do so. If the Supreme Court had to deal with that question, my guess is that they would, like Cory J., give judges an absolute privilege “from testifying as to their mental processes in arriving at a judgment or as to how they reached a decision in any case that came before them”, but that they would permit compelling testimony in exceptional cases with respect to administrative matters.

E. *Lippé* (1991)⁵⁷

The *Lippé* case brought into question the independence and impartiality of part-time municipal judges in Quebec. Municipal courts have been part of the Quebec judicial system since the mid-nineteenth century. Practising lawyers serve as the part-time judges. They handle some civil cases, prosecutions for most provincial and federal summary conviction offences, and breaches of municipal by-laws. The *Lippé* case involved a prosecution under a municipal by-law. Some earlier superior court cases had held that the municipal courts as then constituted were not independent within the meaning of s. 11(d) of the Charter.⁵⁸ As a result, the Act was changed so that the part-time judges hold office during good behaviour and are subject to the same removal rules as for provincial judges.

Although the lower courts seemed to have dealt with this as an issue of both independence and impartiality, when it got to the Supreme Court of Canada, the question focused on impartiality. The Quebec Court of Appeal had unanimously concluded that the municipal courts satisfied *Valente*’s three “essential conditions”⁵⁹ for independence, but by a majority held that the courts were not impartial. Lamer C.J.C. stated: “Since the issue before this court raises no allegations concerning the relationship of the state with the Municipal Courts, I will assume — without expressing an opinion on aspects of the system not properly before this court — that the three criteria from *Valente*, *supra*, are satisfied.”⁶⁰ Lamer C.J.C. then held that the courts did not violate the impartiality provision of s. 11(d). It is possible, therefore, although unlikely, that the question will be back before the courts on the issue of independence.

Lamer C.J.C. expanded the meaning of “impartial” to include what he called “institutional impartiality”⁶¹. This requires looking at the objective status of the tribunal. Impartiality would no longer be just a state of mind. Lamer C.J.C.’s test for institutional impartiality is whether there will be a reasonable apprehension of bias in the mind of a fully informed person who is presumed to have knowledge of any safeguards that are in place.⁶² He sets out a number of safeguards (the oath taken by the judges, their judicial immunity, the fact that they are subject to a code of ethics,

and certain specific restrictions in the legislation) and concludes that the system would not “give rise to a reasonable apprehension of bias in the mind of a reasonable, well-informed person.”⁶³

Lamer C.J.C. had in his reasons limited “independence” to state interference: “The content of the principle of judicial independence is to be determined with reference to our constitutional tradition and is therefore limited to independence from government.”⁶⁴ He gave an expanded meaning of “government”, however, including “any person or body, which can exert pressure on the judiciary through authority under the state.”⁶⁵ This would, for example, cover a Bar Society. It was no doubt because of this interpretation of independence that Lamer C.J.C. focused on impartiality and developed the “objective institutional impartiality” concept.

Gonthier J. wrote a short concurring judgment, but disagreed with Lamer’s restrictive definition of judicial independence. To Gonthier, the pressure or interference with judicial independence could come “from any quarter or for any reason.”⁶⁶ This would include, for example, private parties and corporate giants. As it turned out, a majority of the Court agreed with Gonthier J. that independence is not restricted to independence from the government. It is this no doubt unexpected turn of events that makes the case a difficult one to sort out. If the majority position had been known to Lamer, would he have focused his analysis on impartiality and built into it the new concept of objective institutional impartiality? Or would he have dealt instead with the issue under “independence” or, preferably, under the twin, interrelated concepts of independence and impartiality together, leaving impartiality for cases of perceived or actual partiality?

In any event, the result is that there is now a concept of actual or perceived individual or institutional *independence*, as well as actual or perceived individual or institutional *impartiality*. These concepts have been carried over to administrative tribunals.⁶⁷ Some observers might think that the concept of independence and impartiality is becoming too complex.

F. *Généreux* (1992)⁶⁸

The *Généreux* case dealt with whether a General Court Martial violated the s. 11(d) requirement of “an independent and impartial tribunal”. Unlike *Lippé*, the argument focused on the concept of independence. *Généreux* was tried by a Court Martial for, *inter alia*, trafficking in narcotics off the base.

Lamer C.J.C., giving the judgment for the majority, held that s. 11 applies to a General Court Martial and that even with the flexibility envisioned by *Valente*, “in order to suit the needs of different tribunals, the essence of each condition must be protected in every case.”⁶⁹ “The question,” Lamer C.J.C. stated, “is whether an informed and reasonable person would perceive the tribunal as independent.” Independence, it should be added, now included the wider compass, going beyond government influence, as set out in the majority judgment in *Lippé*. Lamer C.J.C. held that a General Court

Martial failed on all three of *Valente*'s "essential conditions". He disagreed with the 1980 Bill of Rights case of *MacKay*⁷⁰ in which the majority of the Supreme Court upheld a conviction by a military tribunal for trafficking in narcotics. But as Lamer C.J.C. points out, the Court in *MacKay* applied a subjective test, asking whether the tribunal "actually acted in an independent and impartial manner." *Valente* requires an objective test. Laskin C.J.C. had dissented in *MacKay* on the basis that when a person is charged with an offence under the ordinary criminal law "he or she is entitled to be tried before a Court of Justice, separate from the prosecution and free from any suspicion of influence or dependency on others."⁷¹

As stated above, the system under which G  n  reux was tried, said Lamer C.J.C., failed on each of *Valente*'s three tests. The *ad hoc* General Court Martial "did not enjoy sufficient security of tenure to satisfy s. 11(d) of the Charter."⁷² There was not sufficient financial security in that "the executive's opinion of an officer's performance as a military judge may...be a factor in the final determination of his or her salary."⁷³ And, finally, the appointment of the judge advocate to the tribunal by the Judge Advocate General, who is considered part of the executive, breaches the institutional independence of the tribunal.⁷⁴ The system could not be upheld under s. 1 of the Charter because the structure, said Lamer, "cannot be said to have impaired the appellant's s. 11(d) rights 'as little as possible'."⁷⁵

But amendments to the Queen's Regulations and Orders for the Canadian Forces had been brought in after the trial and Lamer considered that these had "gone a considerable way towards addressing" his concerns.⁷⁶ Appointments of persons who are to act as judge advocate at a General Court Martial are now chosen by the Chief Military Trial Judge from persons appointed as military judges for periods of two to four years. Lamer C.J.C. stated that these amendments "appear to correct the primary deficiencies of the judge advocate's security of tenure"⁷⁷ as well as the defects in the institutional independence of the system.⁷⁸ Another amendment now prohibits an officer's performance as a member of a General Court Martial or as a military trial judge from being used to determine qualifications for promotion or rate of pay. Lamer C.J.C. stated that in his view "this is sufficient to correct this aspect of the deficiencies of the system under which the appellant was tried."⁷⁹

L'Heureux-Dub   J. would have upheld the validity of General Court Martials under the legislation at the time G  n  reux was tried. *Valente*'s "criteria of security of tenure and financial security," she stated, "are especially ill-suited to the task given the transitory nature of the General Court Martial and peculiar circumstances surrounding the financial remuneration (or lack thereof) of its members."⁸⁰ In her view, a General Court Martial is a "specific adjudicative task" as contemplated by *Valente*.⁸¹ Further, the possibility of certain discretionary benefits or advantages did not constitute "arbitrary interference by the executive in a manner that could affect judicial independence."⁸² Finally, she was of the opinion that "the Charter permits a sufficient degree of connection between the executive and the participants of a General Court Martial such that the third criteria of institutional independence was satisfied."⁸³

In the end, and contrary to Laskin C.J.C.'s dissent in *MacKay*,⁸⁴ the separate system of military tribunals under the National Defence Act was affirmed by the Supreme Court.⁸⁵ And in the light of the comments by Lamer C.J.C. on the recent amendments, military tribunals will probably withstand further Charter challenges either by not violating s. 11(d) or, if they do, will be upheld under s. 1. So the military lost the battle, but would seem to have won the war.

G. *Bain* (1992)⁸⁶

The concept of impartiality was extended in *Bain* to cover the Crown's right to ask 48 jurors to stand aside in the jury selection process. The majority of the Court held that the procedure violated the "impartiality" part of section 11(d).⁸⁷ Cory J. stated for three members of the Court (another member in a separate judgment adopted essentially the same approach) that the combination of the Crown's stand-asides and peremptory challenges compared to the accused's 12 peremptory challenges in this case "seems to be so unbalanced that it gives an appearance of unfairness or bias against the accused. The impugned provisions permit the Crown to obtain a jury that would at the very least appear to be favourable to its position rather than an unbiased jury."⁸⁸ Using the *Valente* test, he concluded that the procedures "would lead a reasonable person, fully apprised of the extensive rights the Crown may exercise in the selection of a jury, to conclude that there was an apprehension of bias."⁸⁹ This, he held, "could not conceivably be construed" as a reasonable s. 1 limit. He then gave the government six months to remedy the situation.⁹⁰

Gonthier J. delivered a dissenting judgment for three members of the Court. The accused's argument, he said, was based on *Lippé's* "institutional impartiality", and there has to be "a reasonable apprehension of bias in the mind of a fully informed person in a substantial number of cases."⁹¹ (Neither of those writing for the majority discussed or mentioned "institutional impartiality", but just "impartiality".) The standard, he said, "requires more than just a perception of risk: there must be...a serious fear that partial juries will result too often to be explained solely by factors pertaining to each individual situation."⁹² Further, he wanted the "reasonable person" to have studied the issue carefully: "In making up his or her mind about the jury selection process, he or she must be expected to have sought knowledge and to have thought about the formation of jury panels, about the roles the parties play in the jury selection process and about the relationship between the formation of the jury and the trial as a whole."⁹³ "Considering these factors, a disparity in the means afforded to the parties" to select the jury, he concluded, does not create in the well-informed observer "an apprehension that the jury is systematically partial because of the operations of the provisions of the Criminal Code."⁹⁴

H. Conclusion

The six Supreme Court of Canada cases on judicial independence discussed above in general show a reasonable, pragmatic, and restrained approach to the issues. *Valente*⁹⁵ provided a flexible framework for interpreting s. 11(d), which allowed the court to uphold the legitimacy of the Ontario Provincial Courts in that case and the Quebec

Municipal Courts in *Lippé*.⁹⁶ In both cases, however, the legislatures had changed some aspects of their practices before the issue arose in the Supreme Court. The military also changed its practices after the trial in the case of *Généreux*,⁹⁷ and although the conviction in that case was quashed, the overall scheme of military justice would seem to have survived. *Beauregard*⁹⁸ showed statesmanship by the Court in upholding legislation requiring pension contributions from judges. The *MacKeigan*⁹⁹ case, involving the testimony of the judges who sat on the Marshall appeal, was, appropriately, a narrow holding, leaving to a later day the determination of a number of difficult issues. *Bain*¹⁰⁰ is perhaps the maverick case. The result, however, was the passage of government legislation that appropriately balanced the jury selection process. The case can perhaps best be seen as part of the Court's desire to reform the criminal process (often under s. 7) rather than as an analysis of s. 11(d). Like the other s. 11(d) cases, however, it shows the enormous discretion a judge has in using the test of whether a reasonable, well-informed observer would have an apprehension of bias. The same is, of course, true for the test for judicial independence. The reasonable, well-informed person seems to be the judge deciding the case.

5. THE UNITED NATIONS AND OTHER ORGANIZATIONS

There is an immense international literature on judicial independence. Only the highlights of the various international declarations, covenants, and other documents can be touched on here. Not only has Canada been influenced by these developments, but Canadians, in particular Chief Justice Jules Deschênes, have influenced the international movement. The first part of this section looks at various general statements about judicial independence in international declarations and other official international documents. We then examine various attempts to flesh out the standards for judicial independence.

In December, 1948, the United Nations adopted the highly influential Universal Declaration of Human Rights.¹ Article 10 of the Declaration states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

The 1960 Canadian Bill of Rights,² as previously observed, contains very similar language: everyone has the right to "a fair and public hearing by an independent and impartial tribunal." There can be little doubt that the Declaration was the source of the language in the Bill of Rights. The exact language was carried over to the Charter's s. 11(d). A principal difference between the Bill of Rights and the Charter, on the one hand, and the Universal Declaration and later international documents, on the other, is that the Bill of Rights and the Charter are restricted to the criminal law whereas the international documents cover both criminal and civil matters. It is not clear why the words "by an independent and impartial tribunal" were not also repeated in s. 2(e) of

the Bill of Rights concerning the “right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.”

The next major international instrument was the European Convention on Human Rights, which was signed in 1950 and which entered into force in 1953.³ Article 6 states that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁴ The Convention provides machinery for supervision and enforcement, and as of 1992, twenty-two states had recognized the right of individual petitions to the European Commission as well as the compulsory jurisdiction of the European Court of Human Rights.⁵ There is a rich literature interpreting the Convention by both of these bodies.⁶

For Canada, the key international document is the U.N.-sponsored International Covenant on Civil and Political Rights.⁷ This was adopted by the U.N. in 1966 and came into force in March, 1976. Canada signed the treaty the same year, and one of the reasons for enacting the Charter was to fulfil Canada’s international obligations under the Covenant.⁸ Article 14 of the Covenant states, in part: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The section is similar to the Universal Declaration and the European Convention, but it adds the requirement that the tribunal be competent. There are a large number of reported decisions of the U.N. Human Rights Committee⁹ involving those countries (including Canada) that have signed the Optional Protocol and also periodic reports by signatory countries required by the Covenant.¹⁰ The Covenant can be used to help interpret the Canadian Charter so that, if possible, Canadian law will be in line with Canada’s international obligations, but, in fact, it is rarely so used.¹¹

There are other international declarations that could be discussed, such as the 1948 American Declaration of the Rights and Duties of Man,¹² which, unlike the previously mentioned declarations, refers simply in article 26 to an “impartial” rather than to an “independent and impartial” tribunal. The 1969 American Convention on Human Rights, however, adopted the “competent, independent, and impartial tribunal” language found in the U.N. Covenant.¹³ On the other hand, the 1981 African Charter on Human and Peoples’ Rights simply refers to “an impartial court.”¹⁴

There have also been important developments in the various attempts to set out standards with respect to the words “an independent and impartial tribunal.” The most active organization in the 1950s and 1960s was the International Commission of Jurists, which organized international conferences in Athens (1955), Delhi (1959), Lagos (1961), Rio (1962), and Bangkok (1965).¹⁵ The International Commission of Jurists created another organization in 1978, the Geneva-based Centre for the Independence of Judges and Lawyers, whose task was to promote the basic need for an independent judiciary and legal profession throughout the world. The Centre has been active in

publishing material on the subject, organizing conferences and seminars, and working with the U.N. in setting standards for the independence of judges and lawyers.¹⁶

In the past fifteen years, the United Nations has produced a number of important documents. There have been several U.N. bodies working in the areas. In 1980, the Economic and Social Council's Subcommission on Prevention of Discrimination and Protection of Minorities started a major study of the issues under the direction of Dr. L. M. Singhvi of India. In the same year, the U.N. Crime Branch and its Committee on Crime Prevention and Control started work on the topic.¹⁷

A number of international meetings took place in the early 1980s: meetings organized by the International Commission of Jurists and other groups in Sicily in 1981 and 1982; a meeting of the International Bar Association in New Delhi in 1982, which resulted in the adoption of Minimum Standards of Judicial Independence; and the World Conference on the Independence of Justice, organized by Chief Justice Deschênes, held in Montreal in 1983.¹⁸ The Montreal Conference, which was supported by such groups as the Canadian Judicial Council, the Canadian Judges Conference, and the Canadian Bar Association, produced a document entitled "Universal Declaration on the Independence of Justice."

The Universal Declaration produced in Montreal strongly influenced Dr. Singhvi's own 1985 Draft Declaration on the Independence of Justice.¹⁹ At the same time, the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, meeting in Milan in 1985, produced a document entitled "Basic Principles on the Independence of the Judiciary." Chief Justice Deschênes also played a major role in this Congress and the steps leading up to it. Reed Brody, the Director of the Centre for the Independence of Judges and Lawyers, succinctly describes what occurred in Milan as follows: "In Milan, however, the ambitious document prepared by Judge Deschênes ran into difficulty from some Eastern European countries, which threatened to kill it. In the end, the 'guidelines' produced...were scrapped, and only through the work of former CIJL Director Ustinia Dolgopol was a more general set of 'basic principles' able to be adopted by consensus."²⁰

The Basic Principles were "endorsed" by the U.N. General Assembly the same year (1985), and the Assembly invited governments "to respect them and to take them into account within the framework of their national legislation and practice."²¹ The Basic Principles, set out in Appendix A of this Report, consist of 20 principles, setting out standards for the independence of the judiciary (e.g., a "duty...to provide adequate resources to enable the judiciary to properly perform its functions"), as well as rules regarding selection and promotion ("promotion...should be based on objective factors, in particular, ability, integrity and experience"), service and tenure ("adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law"), immunity ("personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions"), and discipline, suspension, and removal ("judges shall be subject to

suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties’’).

The Basic Principles have therefore become the U.N.’s principal document on judicial independence. The Commission on Human Rights, in effect, conceded that standard-setting would be the job of the U.N.’s Crime Branch. The Human Rights Commission instructed the Subcommission to work, instead, on implementation.²² In 1993, the Subcommission recommended the creation of a monitoring mechanism on the independence and impartiality of the judiciary (along with lawyers) and the nature of potential threats to their independence and impartiality. And in July, 1994, an Economic and Social Council decision approved a resolution of the Human Rights Commission to appoint a special rapporteur on the subject.²³ Thus, U.N. action on the topic continues.

6. EMERGENCIES

The various covenants and conventions described in the previous section normally provide what is called a ‘‘derogation clause’’, permitting some rights to be suspended in time of an emergency. Article 4 of the Covenant on Civil and Political Rights, for example, states:¹

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

A further subarticle² provides that derogation may not be made with respect to certain articles; however, article 14, the article that requires ‘‘a fair and public hearing by a competent, independent and impartial tribunal established by law’’, is not included in the list.

The declaration of an ‘‘emergency’’ can often be used as a pretext to suppress human rights. Many examples throughout the world could be cited, but I will concentrate on Germany’s Third Reich. Hitler used the Reichstag fire in 1933 to bring in the Reichstag Fire Decree, the preamble of which stated that it was ‘‘to defend the state against Communist acts of violence.’’³ ‘‘What was actually decreed,’’ writes Ingo Müller in his frightening book *Hitler’s Justice: The Courts of the Third Reich*, ‘‘was the loss of all personal rights during the Third Reich.’’⁴ The judiciary went along with Hitler’s ‘‘emergency’’. Hitler had the year before decreed the permanent removal of all judges and other officials who were Jews, Social Democrats or ‘‘otherwise politically unreliable.’’⁵ In Prussia alone, 643 Jewish judges were dismissed.⁶

The German judiciary did not protest these actions. The Chairman of the German Federation of Judges had an audience with Hitler and reported: "The chancellor was clearly in agreement with our remarks and assured us that he would continue to maintain the independence of judges, even though certain measures would be necessary."⁷ The few protests from the judiciary were directed at the threat to reduce retirement pensions.⁸ *Hitler's Justice* is a sobering book. The German judiciary had previously had a tradition of independence, yet caved in to Hitler. The judiciary in Germany turned out to be a very thin reed against tyranny. An independent judiciary drawn from an independent bar, in the common-law tradition, might perhaps have done better, but one lesson to this writer is to continue to strengthen political and other institutions and not to place all our faith in the judiciary.

Let us look at laws relating to emergencies in Canada. In 1988, Canada brought in the Emergencies Act,⁹ which replaced the War Measures Act.¹⁰ The War Measures Act, first introduced in Canada in 1914, allowed the executive to issue a proclamation "declaring that war, invasion or insurrection, real or apprehended, exists."¹¹ The Act provided that the issue of a proclamation "shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists."¹² The courts did not allow litigants to challenge the declaration.¹³ In 1960, provision was made for the submission of any declaration to Parliament, and if both Houses agreed, it would be revoked.¹⁴ The Canadian Bill of Rights¹⁵ was, however, specifically excluded from applying to the War Measures Act.¹⁶

The new Emergencies Act does not exclude the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights. The preamble to the Act specifically states that any temporary measures would be subject to the Charter and the Bill of Rights and would also have to take into account the International Covenant on Civil and Political Rights:

And whereas the [cabinet], in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency.

The Act carefully distinguishes amongst various categories of emergencies (including a "public order emergency")¹⁷ and limits what the government can do in each category. Nowhere does it say that the government can set up emergency tribunals or interfere with the independence of the judiciary. The declaration must be laid before each House of Parliament within seven days after it is issued,¹⁸ and if *either* House votes against confirmation, the declaration is revoked.¹⁹ Further, the legislation provides for a Parliamentary Review Committee²⁰ and, later, for a formal inquiry.²¹

A court would therefore have to determine whether the Charter is breached by action under the Act, and if so, whether the declaration can be upheld under section 1, which provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and

freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' The repealed War Measures Act also did not exclude the Charter, although, as mentioned above, it did exclude the Bill of Rights.

The government can, of course, have other legislation passed giving it wider powers than those contained in the Emergencies Act, but this would require going before Parliament. (The Emergencies Act specifically prohibits orders or regulations under that Act altering the provisions of the Emergencies Act.²²) Further legislation could exclude most of the Charter, including section 11(d), under the "notwithstanding" clause,²³ but the courts would not let the government interfere with the independence of the federally appointed judiciary. Sections 96, 99 and 100 of the Constitution Act, 1867, are not subject to the "notwithstanding" clause.

This brief review of emergency powers in Canada shows that we are now fairly well protected against executive tyranny by a combination of Parliament and the judiciary.

7. FURTHER CONSTITUTIONALIZATION OF THE JUDICIARY

Two questions should be explored. Should the Supreme Court of Canada be entrenched in the Constitution? Secondly, should there be a general provision in the Constitution relating to the independence of the judiciary? Almost all knowledgeable observers would say yes to the first question, although the details would be the subject of dispute. There is less unanimity on the second question. Let us look at each in turn.

If there had been agreement at the time of Confederation on the establishment of the Supreme Court, it would no doubt have been included in the British North America Act. Instead, section 101 of the Constitution provided for the future establishment of such a court, which the federal government established in 1875.¹

The danger in not having the Court established in some detail in the Constitution is that it can be manipulated by the government by adding members. This was, of course, threatened by U.S. President Franklin Roosevelt's court-packing proposal in the 1930s. The proposal was not implemented, however, because the majority of the Court was prepared to uphold Roosevelt's New Deal legislation (thus the expression "a switch in time saved nine").² The controversy is, of course, well known. A similar court-packing scheme in South Africa in 1955 is less well known but succeeded in enlarging the Supreme Court from six to eleven members. The government was therefore able to appoint five new members of the Court, and thus the former courageous opposition of the Supreme Court to the government's apartheid plans would be no longer effective.³

Almost all the Canadian constitutional proposals for the past twenty-five years have proposed that the Supreme Court be entrenched in the Constitution. There was such a

proposal in the Victoria Charter of 1971⁴ and in the Constitutional Amendment Bill in 1978.⁵ The latter would have enlarged the Court from nine to eleven members and required that the appointments be ratified by the proposed House of the Federation. The Bill was not proceeded with, however, after the Supreme Court of Canada declared that the Bill's Senate proposal was unconstitutional.⁶

The 1982 proposals which became law did not have a section on the Supreme Court, but they did provide in s. 41 that amendments relative to "the Composition of the Supreme Court of Canada" required the unanimous consent of the provinces.⁷ Constitutional scholars are not in agreement on the extent to which the federal government can now unilaterally change the Supreme Court Act. Peter Hogg argues that the federal government can change any aspect of the Act, including the composition of the Court.⁸ Ronald Cheffins, on the other hand, argues that the Supreme Court Act⁹ is now part of the Constitution.¹⁰ Peter Russell explores both positions and rightly concludes that "the situation is far from clear."¹¹ It seems to me, however, that the Supreme Court of Canada would likely conclude that unanimity would be necessary for increasing the number of judges or the number of those that have to be from Quebec, both of which are set out in the Supreme Court Act. The Court would not assume that s. 41(d) was meaningless and was to be completely ignored.¹² Other matters connected with the Court, however, including methods of selection, can probably be done by the federal government unilaterally. The federal government took the position that they could unilaterally change some parts of the Act in enacting extensive amendments to the Supreme Court Act in 1987.¹³

Both the 1987 Meech Lake¹⁴ and the 1992 Charlottetown¹⁵ Accords would have constitutionalized the Supreme Court.¹⁶ The Charlottetown Accord specified that "The Supreme Court should be entrenched in the Constitution as the general court of appeal of Canada."¹⁷ It would consist of nine members, three of whom would come from the Quebec bar.¹⁸ Judges would be named from lists submitted by the governments of the provinces and territories, with provision for "the appointment of interim judges if a list is not submitted on a timely basis or no candidate is acceptable."¹⁹ The role of Aboriginal peoples in relation to the Supreme Court would be left to further negotiations.²⁰ A legal text²¹ fleshing out the Accord was produced shortly before the Canada-wide referendum. On October 26, 1992, 54% of the people of Canada rejected the Accord.²²

It would clearly be desirable to include the Supreme Court of Canada more firmly in the Constitution. The South African experience discussed above shows the importance of such a step. Although in my opinion the Supreme Court would surely prevent court-packing by the government by its interpretation of section 41 of the Constitution (requiring unanimity with respect to the composition of the Court), the matter is not as clear as it should be.

Should a general concept of judicial independence be included in the Constitution? Such a provision had been included in the 1978 Constitutional Bill, section 100 of which provided: "The principle of the independence of the judiciary under the rule of

law and in consonance with the supremacy of the law is a fundamental principle of the Constitution of Canada.” As previously stated, this Bill was dropped and the later Constitutional Act of 1982 did not contain such a clause.

Perhaps the reason it was not included in the 1982 Constitutional Act was that provisions relating to the Supreme Court of Canada were put over to later discussions. Moreover, section 11(d) specifically referred to “an independent tribunal” in relation to those charged with a criminal offence. Another explanation is that the provinces were worried about the boost such a provision would give to institutional autonomy. The provinces have responsibility under the Constitution for the administration of justice²³ and, as we will see in a later chapter, have charge of administering most aspects of the courts. There was at the time, however, considerable agitation by some members of the judiciary to administer the judicial system themselves. Chief Justice Jules Deschênes, an active supporter of judicial management of the courts, had been officially appointed by the Canadian Judicial Council a year earlier to study the question, and he reported in September, 1981.²⁴ In his section headed “Constitutional Foundation of the Judicial Power”, he concluded that “judicial power needs a degree of administrative independence”²⁵ and, two pages later, stated that “independence must be explicitly guaranteed in constitutional provisions enshrining the principle.”²⁶ No doubt, the juxtaposition of the two ideas worried some provincial officials. There was also the issue of the growing militancy of the provincially appointed judges. A recent commentator observed that such a clause would have “lent substantial credibility to provincial and territorial courts who did not enjoy the same benefits and independence the federal courts enjoyed.”²⁷ “The provinces and territorial governments,” he added, “may not have been receptive to adding more power and prestige to their courts.”²⁸

During the 1980s, the judiciary quietly lobbied for the inclusion of some further recognition of judicial independence in the Constitution, without effect. A general provision was not included in either the Meech Lake or the Charlottetown Accord. In October 1991, Chief Justice Lamer wrote to Kim Campbell, the then Minister of Justice, suggesting that the Canada Clause, which would guide the interpretation of the Constitution should state that the Canadian system of government “comprises three branches: the legislative, the executive, and an independent judiciary.”²⁹ The Minister of Justice’s response was to point out that the right to an independent judiciary is already contained in section 11(d) of the Charter and, for the superior courts, in sections 99 and 100 of the Constitution Act. Nevertheless, she stated, she would “make sure that the principle of an independent judiciary is given full consideration” in the pending discussions.³⁰ The final draft of the Charlottetown Accord did not, however, contain a reference to the separation of powers or to the independence of the judiciary, although, as previously discussed, it included provisions on the Supreme Court of Canada. It did, however, add a reference to “the rule of law”, so that the Canada Clause would provide that the Constitution would be interpreted in a manner consistent with one of the fundamental characteristics of Canada, namely, that it is a “democracy committed to a parliamentary and federal system of government and to the rule of law.”³¹

Some political scientists are not in favour of including a general clause in the Constitution. Peter Russell, for example, points out that “a guarantee of judicial independence would also call upon Canadian judges to determine the essential institutional requirements of judicial independence.”³² He then raises what he calls the “somewhat indelicate” thought that “in interpreting such a guarantee, judges are policing the boundaries of their own power.”³³ “Canadians,” he suggests, “might well be cautious about making changes in the Constitution which will give judges a more powerful role in defining their own power and shift power away from those who are politically accountable and represent other interests in society.”³⁴

One would not have thought that an innocent-looking clause stating the obvious fact that judicial independence is a fundamental value in Canadian society would cause a stampede of self-interest. Nevertheless, it would be a factor in encouraging the judiciary to develop an American-style separation of powers. Although writers such as Russell³⁵ and Hogg³⁶ point out that Canada, with its close connection between the executive and the legislature, does not have America’s separation of powers doctrine, Canadian courts sometimes adopt language suggesting that it does. In a 1994 Supreme Court of Canada case, for example, L’Heureux-Dubé J., relying on an earlier statement by Dickson C.J.C.,³⁷ stated for the majority of the Court: “In contrast to the U.S. Constitution, no general ‘separation of powers’ doctrine is spelled out in the *Constitution Act*, 1867. However...such a separation of powers does in fact exist.”³⁸

Perhaps it would be better to leave things as they are with respect to a general statement on judicial independence. We now have a number of important provisions in the Constitution relating to judicial independence: section 11(d) of the Charter, requiring “an independent and impartial tribunal”; sections 96, 99, and 100, relating to the independence of federally appointed judges; and a preamble that states that Canada has a constitution “similar in Principle to that of the United Kingdom.” As previously discussed, the Supreme Court of Canada has used the existing provisions in a reasonable, pragmatic, and restrained manner. It is true that sections 96, 99, and 100 are not applicable to provincially appointed judges, but section 11(d) of the Charter is, and the courts can, as they did in *Valente*,³⁹ introduce those attributes of independence that are appropriate. Further, it is possible that we may see some development of the concept of judicial independence under section 7 of the Charter, to the extent that it is not covered under section 11(d). Thus, judicial independence, with the possible exception of the Supreme Court of Canada, is now well entrenched in the Constitution. Renewed efforts should, instead, be made to constitutionally entrench the Supreme Court of Canada.

CHAPTER TWO: PROTECTING THE JUDICIARY

In this chapter we examine a number of issues relating to the protection of the judiciary from physical, political, and psychological harm. Each could be examined in far more depth than I have the time or space to do here. An entire book, for example, has recently been published on judicial immunity from lawsuits.¹

1. PHYSICAL HARM

A number of judges across Canada told me about their concern for their physical safety. The Canadian Bar Association's *Report on the Independence of the Judiciary* stated in 1985 that "concerns about security are becoming increasingly urgent."¹ In some jurisdictions, such as Italy and Northern Ireland, the protection of the judiciary from physical harm is of great concern.² A lack of protection from intimidation will understandably influence — consciously or subconsciously — the impartiality of adjudication. A 1994 report by Jonathan Fried of Canada's Department of External Affairs to the Inter-American Juridical Committee outlines the extreme situation in Colombia and Peru as follows:³

In Colombia, the Andean Commission of Jurists calculates that an average of twenty-five judges and lawyers have been assassinated or have been attacked each year since 1979. In 1989 alone, there were nine known assassinations of judges, two attempted assassinations and countless death threats. By 1990, these numbers had increased to eleven judges assassinated and nine who faced attempts on their lives. Between 1989 and 1990, the reports indicated that at least two of the murdered judges requested but did not receive any police protection. Harassment and arrests of judges and lawyers in Colombia has also been reported.

In Peru, in 1989-90, seven assassinations of judges were reported along with two attempted assassinations. In 1990-91 six assassinations and five attempts were reported against judges, with one attempt reported against a court staff member. Lawyers also faced assassinations, death threats, kidnapping and bombings.

Some, but not all, international declarations on the independence of the judiciary specifically mention physical protection. The 1981 Draft Principles on the Independence of the Judiciary, for example, specifically provide: "It is the responsibility of the executive authorities to ensure the security and physical protection of members of the judiciary and their families, especially, in the event of threats being made against them."⁴

The issue of physical protection is potentially a serious one⁵ and it is not difficult to envision scenarios in Canada where the safety of judges would be seriously threatened.

2. POLITICAL INTERFERENCE

In some countries, political interference with the judicial process can be a major problem. In the former Soviet Union, for example, as is well known, the line between the Communist Party and the judiciary was deliberately blurred, if it existed at all.¹ Even in post-Soviet Russia, as shown by the controversy between Boris Yeltsin and the then chief justice of the Constitutional Court, Valery Zorkin, there has been an interaction between politics and the judiciary which appears surprising and unacceptable to Western observers.²

Canada has had relatively few documented cases of governmental interference with judicial decision-making. The best known is the so-called “judges affair” in 1976.³ A Quebec superior court judge had been hearing a contempt proceeding against a federal cabinet minister, André Ouellet, who had criticized an acquittal in a combines case by calling the decision “completely unacceptable”, “silly”, and “a complete disgrace”. At Ouellet’s request, another cabinet minister, Bud Drury, had telephoned the judge hearing the contempt citation concerning the possibility of Ouellet’s apologizing and thus bringing the proceedings to an end.

This conversation came to light in a dispute between the federal minister of justice and the judge who had cited Ouellet for contempt, over the payment of the counsel the judge had appointed to argue whether a contempt citation should be issued. (The judge hearing the contempt citation was not the same judge who issued the citation.) In the letter the judge sent to Ron Basford, the minister of justice, the judge stated that he had warned Ouellet “to refrain from interfering with the course of justice, a practice that seems to be all too prevalent amongst your colleagues.” When asked by the Minister of Justice to explain the remark, he referred to the Drury incident and two other matters involving two other cabinet ministers. The exchange of correspondence was leaked to the *Globe and Mail*.⁴

For the next ten days, the opposition called for a judicial inquiry, but the government referred the matter to the chief justice of the Quebec superior court, Jules Deschênes. Deschênes’ letter, which was tabled in the House and printed in Hansard of March 12, 1976,⁵ more or less absolved two of the ministers, although finding their conduct in one case “unusual” and in the other “not proper practice”⁶. Drury’s action, Deschênes stated, was, however, considered “improper” by the judge who was telephoned, although not believed by him to be an attempt to influence his decision. Deschênes viewed the facts as related by the judge as “grave”⁷. Drury then tendered his resignation,⁸ but it was not accepted by the prime minister, Pierre Trudeau.⁹

Prime Minister Trudeau used the occasion to make a statement that would supplement earlier rules of ethics relating to ministers.¹⁰ "In so far as this government is concerned," he stated, "I believe that it must be clearly established that in future no member of the cabinet may communicate with members of the judiciary concerning any matter which they have before them in their judicial capacities, except through the Minister of Justice, his duly authorized officials or counsel acting for him."¹¹ Ministers could still have some contact with judges, however. To prevent it, Trudeau said, "would be ridiculous, not only for its effects on purely social relationships but also because a number of ministers must in the course of their duties discuss matters of government business with members of the judiciary."¹² The rule has caused a number of resignations. The following year, the minister of labour, John Munro, resigned when it became known that he had called a judge on behalf of a constituent regarding a sentence to be imposed.¹³ In 1989, the minister of fitness and amateur sport, Jean Charest, resigned when he telephoned a judge about a pending case.¹⁴

The guidelines for cabinet ministers are "classified" and hence not officially public documents. Apparently, there were further guidelines issued in 1984 and 1993 and the guidelines are now being further revised.¹⁵ On October 31, 1994, Prime Minister Chrétien made a statement in the House (arising out of the Minister of Canadian Heritage, Michel Dupuis' contacting the C.R.T.C.) relating to ministers contacting administrative agencies. In doing so, he reiterated the prohibition on contacting judges: "Everyone understands the rule that no one is to call judges concerning cases they have under consideration. This applies to everyone—Ministers, M.P.s, and ordinary citizens. The rule concerning relations with the judiciary is unequivocal and has been in force for over ten years. No Minister may communicate with members of the judiciary concerning any matter which they have before them in their judicial capacities, except through the Minister of Justice, or through duly authorized officials of, or counsel acting for, that Minister."¹⁶

The situation, Chrétien went on, is not as clear with respect to administrative tribunals. "As part of the decision-making process," he stated, "some tribunals welcome representations from ordinary citizens and Members of Parliament. These representations are put on the public record."¹⁷ Chrétien instructed his officials, in consultation with the new Ethics Counsellor, to develop more complete guidelines with respect to ministers' dealing with administrative tribunals.¹⁸

There have also been some well-publicized incidents involving provincial governments. In 1978, for example, Premier William Davis of Ontario issued guidelines similar to Ottawa's relating to ministers' contacts with judges and prosecutors, in response to an incident involving the solicitor-general, George Kerr, who had telephoned a prosecutor in relation to charges brought against one of the minister's constituents. The Solicitor General eventually submitted his resignation.¹⁹

An incident arose the following year, 1979, in British Columbia after the deputy attorney general, Richard Vogel, requested a family court judge, who had thought a piece of provincial legislation expanding the family law jurisdiction of provincially

appointed judges was unconstitutional, to let other judges more sympathetic with the legislation hear the cases.²⁰ The judge protested in open court, stating that the deputy's intervention was improper.²¹ British Columbia Justice P. D. Seaton was appointed a commissioner to look into the issue. He concluded that Vogel's conduct was "inappropriate", although the communication was made "with the best of intention while a difficult problem was facing the Ministry", and therefore he did not recommend that the deputy be censured.²²

In 1990, Premier Bob Rae of Ontario announced a new set of guidelines²³ to strengthen the existing standards for cabinet ministers and parliamentary assistants.²⁴ Included in the guidelines is a section which states: "Ministers (except the Attorney General in the exercise of official duties) shall not communicate with members of the judiciary concerning any matter pending before the court."²⁵ Further, the Ontario Commissioner on Conflict of Interest, established in 1988,²⁶ publishes rulings to guide members of the legislature, including ministers.²⁷ For example, one opinion, given to a member who asked what he could do for a constituent who had been waiting for two years for the court to issue a judgment, stated: "The member may write a letter of inquiry to the Chief Justice of the Ontario Courts of Justice requesting the status of the decision only."²⁸

3. CONTEMPT OF COURT

Contempt of court procedures have been used by the courts for many purposes: to prevent an unwarranted interference with the judicial process; to ensure that its orders are not publicly flouted; and to protect the courts from scandalous attacks.¹ Contempt of court is a common law offence preserved by the Canadian Criminal Code.² "It is a sanction," wrote John Laskin J.A. in a recent case, "that courts have imposed for centuries to uphold the public's confidence in and respect for the administration of justice."³ All courts can punish for contempt in the face of the court (*in facie*), but only superior courts can do so in other cases (*ex facie*).⁴

Contempt of court has withstood Charter attacks as being too vague.⁵ And, although courts have considered it to be an "offence" under section 11 of the Charter, it has not, in general, been held to violate the procedural provisions of section 11.⁶ Even the jury section (s. 11(f)), which provides for a jury trial if the potential penalty is five years or more, is not violated, though no maximum penalty is specified for contempt. The Ontario Court of Appeal has held that since penalties have never been as high as five years, the section is not applicable.⁷ The Ontario Court of Appeal did hold, however, in a later case, that a summary trial before the judge who was the object of the contempt may in certain circumstances violate the "independent and impartial tribunal" portion of section 11(d) of the Charter.⁸ And the Supreme Court of Canada has held that the person accused of contempt cannot be compelled to be a witness.⁹

Interference with the judicial process is the most common form of contempt of court. The Supreme Court of Canada, for example, has upheld convictions for contempt by picketers who blocked access to a courthouse.¹⁰ "How can the courts independently maintain the rule of law and effectively discharge the duties imposed by the Charter," wrote Dickson C.J.C. for the Supreme Court, "if court access is hindered, impeded or denied?"¹¹ Prejudicing an accused's trial by publishing his previous criminal record is a further example of contempt of court.¹² Refusal of a witness to give evidence is still another common example where contempt may be used by the courts. A recent Ontario Court of Appeal case involving a lawyer "double-booking" court appearances shows, however, that the courts will reserve the contempt power "for serious cases."¹³ A court, they stated, should not find a lawyer in contempt unless it found that the lawyer's "misconduct caused a serious, real, imminent risk of obstruction of the administration of justice accompanied by a dishonest intention of bad faith."¹⁴

A second category of contempt is failure to obey an order of a court. Although not all breaches of a court order are considered criminal contempt, McLachlin J., giving the judgment for the majority of the Supreme Court in a 1992 case, stated that "when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal."¹⁵ "The gravamen of the offence," she went on to say, is "the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court."¹⁶ While upholding this form of contempt, she nevertheless cut down on its application by requiring the Crown to prove beyond a reasonable doubt the public nature of the conduct as well as a requisite mental state before there can be a conviction. She stated: "To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*)."¹⁷

The controversial issue is whether "scandalizing the court" is still an offence in the light of the Charter. The offence was resurrected in England in the year 1900 because of a scurrilous attack on Mr. Justice Darling.¹⁸ Darling had told the Birmingham newspapers that they were not to publish certain obscene material. A publisher, Gray, was subsequently convicted of scandalizing the court when he wrote, *inter alia*: "Mr. Justice Darling would do well to master the duties of his own profession before undertaking the regulation of another."¹⁹ The Court of Appeal ordered Gray to pay a £100 fine and costs. The offence had not been used in England for centuries, although it had been used in the colonies.²⁰ The *Gray* case was cited with approval in several factually different Supreme Court of Canada cases.²¹

In the 1987 *Kopyto* case,²² the Ontario Court of Appeal dealt with the issue of "scandalizing the court". It is not an easy decision to interpret.²³ There were four separate judgments from the five-person court. The reader will, no doubt, recall that a lawyer, Harry Kopyto, had said to the press after the conclusion of a trial: "This decision is a mockery of justice. It stinks to high hell...Mr. Dowson and I have lost faith in the judicial system to render justice. We're wondering what is the point of

appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the R.C.M.P. are sticking so close together you'd think they were put together with Krazy Glue."²⁴ One judge, Houlden J.A., said that the offence of scandalizing the court after a case is completed should no longer be an offence in the light of the Charter's freedom of expression provision. Two others (Cory and Goodman J.J.A.) did not go as far, holding that there may be some extreme cases where it could still apply. Cory J.A., using the language of the American cases, said that "the prosecution would be required to demonstrate a clear and present danger to the administration of justice."²⁵ Goodman J.A. took the same approach: "Unless...the fact that justice has been brought into disrepute results in a clear, significant and imminent or present danger to the fair and effective administration of justice, it does not justify the creation or maintenance of such an offence as a limitation on the rights of freedom of opinion and expression."²⁶ Goodman's test for whether the administration of justice would be brought into disrepute would be the same as that adopted for the exclusion of evidence under section 24(2) of the Charter²⁷ and, as we saw earlier, to determine whether a tribunal is independent.²⁸

Two judges (Dubin C.J.O. and Brooke J.A.) concurred in the result but dissented on the issue of the ingredients of the offence. They held that scandalizing the courts even after a case is completed can be a contempt of court. But then they adopted essentially the same test as Goodman J.A. Dubin C.J.O. held that a high level of *mens rea* was required²⁹ and then said with respect to the *actus reus*: "It was essential for the Crown to prove that the statement made by the appellant was calculated to bring the administration of justice into disrepute...What must be shown is that, by reason of the statement made by the appellant, there was a serious risk that the administration of justice would be interfered with. The risk or prejudice must be serious, real or substantial."³⁰ The test proposed by Dubin and Brooke for determining whether the administration of justice would be brought into disrepute is, therefore, essentially the same test proposed on this aspect of the case by Goodman, that is, the reasonable person test. The result is, in my view, that on this aspect of the case Dubin's dissenting opinion, with which Brooke concurred, is really the majority opinion!

In any event, the scope of the offence of scandalizing the court has been substantially cut down. The Canadian Judicial Council's 1992 document, "Some Guidelines on the Use of Contempt Powers", rightly states: "For practical purposes, scandalizing by words will rarely be an offence, particularly with regard to completed proceedings. Generally speaking, judges must henceforth be prepared to endure almost any form of out of court criticism."³¹ The Supreme Court of Canada has not dealt with this aspect of contempt after the Charter,³² but, in my view, if and when it does, it is likely to adopt the "reasonable person" test that it has used in other situations. If this approach is, in fact, adopted, it is unlikely that the comments made by André Ouellet, discussed in the previous section, would now amount to contempt.³³ And Solicitor General Douglas Lewis' pre-election law and order statement in September, 1993, that the judges should "get real and get a grip" with respect to sentencing would appear not to be contempt of court.³⁴

4. IMMUNITY FROM CIVIL AND CRIMINAL PROCESS

Immunity from lawsuits protects the judge from possible intimidation and harassment. This is widely accepted in all jurisdictions. The 1983 Montreal Declaration, for example, states: "Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity."¹ And the 1985 U.N. approved document, "Basic Principles on the Independence of the Judiciary", provides that "judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."² The key questions are whether the immunity should be absolute or qualified; whether it applies in Canada to provincial as well as superior court judges; whether judges are also protected from criminal prosecutions. These are some of the issues that will be touched on in this section.

Canada, like England and the United States, provides absolute immunity from civil suits brought against superior court judges³ and, most likely, provincial court judges.⁴ Many commentators, however, argue that this goes too far and that only a qualified immunity is necessary. A recent book on the subject, for example, concludes that there should be only qualified immunity, stating: "Surely, exceptions to immunity, such as for malicious, corrupt, or reckless conduct, would discourage malice or indifference by encouraging all judges to be more careful, disciplined, and thorough."⁵ The author would, however, give absolute immunity to public prosecutors.⁶ This is the very opposite of the present Canadian position, where the Supreme Court in the *Nelles* case⁷ reduced the immunity of prosecutors to one of qualified immunity only. Another commentator in the *Alberta Law Review* argued that judges should now be treated the same as prosecutors, stating: "No person who wields public power maliciously should be immune from responsibility to a party injured as a result."⁸ Is the distinction between judges and prosecutors justified? In my opinion, it is, even though there is some truth in Sandra Day O'Connor J.'s view, expressed in a U.S. Supreme Court case: "One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious law suits can have on the judicial function than they are to similar dangers in other contexts."⁹ Let us look at the situation in England and the United States before examining the Canadian law in more detail.

Lord Coke gave the first important decision on judicial immunity in a Star Chamber case in 1607, stating: "for this would tend to the scandal and subversion of all justice. And those who are the most sincere, would not be free from continual calumniations."¹⁰ It has been an accepted part of the common law since then. In 1975, for example, Lord Denning stated:¹¹

[N]o action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil

proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action...[A] judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, even though he may be mistaken in that belief and may not in truth have any jurisdiction.

The reason for the rule, according to Compton J. in an 1867 case, was “to secure the independence of the Judges, and prevent their being harassed by vexatious actions.”¹² The judge “should not have to turn the pages of his books,” Denning stated, “with trembling fingers, asking himself: ‘If I do this, shall I be liable in damages?’”¹³ Denning’s articulation of the rule allows a measure of flexibility, however. He uses the expression “the bona fide exercise of his office.” According to Lord Bridge in a later House of Lords case, imposing a sentence of imprisonment on an acquitted defendant would make the judge liable for damages.¹⁴ “[T]he holder of any judicial office who acts in bad faith, doing what he knows he has no power to do,” Lord Bridge stated, “is liable in damages.”¹⁵ Moreover, Parliament can change the common law on immunity. The great Habeas Corpus Act of 1679, for example, imposes a fine of £500 payable by the judge to the prisoner who has been improperly denied the writ.¹⁶

The common-law rule of absolute immunity was clearly established in the United States in the Supreme Court case of *Bradley v. Fisher* in 1872, where the Court recognized that “it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.”¹⁷ The rule applies to all levels of American courts¹⁸ and has been extended to federal administrative law judges as well.¹⁹

“A judge will not be deprived of immunity,” the U.S. Supreme Court stated in 1977 in the case of *Stump v. Sparkman*, “because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the ‘clear absence of all jurisdiction’.”²⁰ In the *Stump* case, Judge Stump approved a petition by a mother to have her fifteen-year-old daughter sterilized without a hearing. Years later, the daughter, who had not been notified of the petition and thought she was having her appendix removed, brought an action for damages against the judge. The Supreme Court, by a majority, held that the action could not succeed because the judge had not acted in the “clear absence of all jurisdiction”. The dissenting judges, who would have permitted the lawsuit, stated: “[T]he conduct of a judge surely does not become a judicial act merely on his own say-so. A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity.”²¹

Thus an American judge’s immunity does not apply if he or she acts in “complete absence of all jurisdiction”. Further, if the judge is acting in an administrative capacity there is only a qualified immunity.²² And in the 1984 case of *Pulliam v. Allen*,²³ the U.S. Supreme Court construed a federal statute as permitting costs to be awarded

against a judge who had been subject to injunctive relief in inappropriately denying bail. This last case caused some judges to take out liability insurance.²⁴ But, as Peter Shuck has stated, in spite of these inroads into absolute immunity, it is “almost impossible to sue judges successfully or even to survive a motion to dismiss.”²⁵ The *Pulliam* case shows, however, that we are dealing with common-law immunity and that it can be changed by appropriate legislation.

Canadian law, as previously stated, also provides the judge with absolute immunity from civil suit. We saw in an earlier section that in 1989 the Supreme Court of Canada in *MacKeigan v. Hickman*²⁶ upheld the judge’s absolute testimonial privilege and the majority would not lower it for administrative matters. The Court is likely to adopt the same approach for immunity from lawsuits. Still, there is enough flexibility within absolute immunity to permit suits in exceptional cases. If a surrogate judge misappropriated funds for his or her own benefit, to take one example, the courts would surely allow a lawsuit for the return of the funds. The judge would be said not to be acting “in good faith”, to use Denning’s language, or would be considered not acting “judicially”, or would be acting in the “clear absence of all jurisdiction,” to use the language in the American cases. The Supreme Court of Canada left the issue open in a 1985 case.²⁷

Will absolute immunity apply to provincial courts as well as superior courts? The legislation in some provinces, such as Quebec, provides that provincial court judges “shall enjoy the same immunity as judges of the Superior Court”²⁸. Other provinces, however, such as Alberta, provide for only a qualified immunity: “No action may be brought against the judge for any act done or omitted to be done in the execution of his duty or for any act done in a matter in which he has exceeded his jurisdiction unless it is proved that he acted maliciously and without reasonable and probable cause.”²⁹ The Canadian Bar Association’s 1985 Judicial Independence Task Force recommended that “absolute immunity for acts performed judicially be extended to judges of all ranks, whatever the source of their appointment, even if this requires legislative change.”³⁰

The Manitoba Court of Appeal recently achieved the C.B.A.’s objective without legislative change by construing a section comparable to Alberta’s as not placing a limit on the absolute immunity that the judges in Manitoba would otherwise have; rather, the section extended qualified immunity to acts that were in excess of jurisdiction.³¹ A legislature could, if it wished, make it clear that only a qualified immunity applied to a provincial judge. Whether a legislature or Parliament could do so for federally appointed judges is less certain. The American cases make it clear that the immunity can be overborne by appropriate legislation. But we observed in an earlier section, discussing *MacKeigan v. Hickman*,³² that the Supreme Court may state that a judge cannot be compelled to testify as a constitutional principle. There is a similar possibility with respect to the question of judicial immunity from suit.

Is it desirable to have absolute judicial immunity? In my opinion it is. “Malice” should not remove the immunity, although there should be a qualified immunity for the

extreme examples discussed earlier. If a finding of malice were permitted to overcome immunity, it might be difficult to block unwarranted cases at an early stage of the proceedings. Peter Shuck states that in the U.S. “experience with qualified immunity rules suggests that plaintiffs can easily allege the requisite malice or reckless disregard of their rights to survive a motion to dismiss.”³³ A judge who is subject to a civil action alleging malice would find it awkward continuing to sit to hear cases. Thus, the effective use of judicial resources would be harmed and, moreover, judges might make rulings to avoid the possibility of such lawsuits. It is sometimes suggested that the civil action could be against the organization,³⁴ although it is not clear whether the organization would be the bench or the government. In a 1984 case, Mr. Justice David McDonald of Alberta held the state liable in a case where a judge improperly used a contempt citation, thus breaching the Charter.³⁵ It seems to me this solution might prove more troublesome for the administration of justice than a suit against the judge personally, in that it would probably encourage more such suits. The judge would be almost as worried about such a suit as one brought against him or her personally, and the judge’s effectiveness while the suit was progressing would be as substantially diminished as if the suit were against the judge.

There are better techniques to help ensure that judges act properly, such as the appeal procedure³⁶ and the judicial council discipline process. The availability of these techniques with respect to the judiciary justifies, in my view, absolute immunity for *bona fide* judicial activity and yet only a qualified immunity for prosecutors.³⁷ If there is a Charter violation, as there usually will be, in such cases (e.g., s. 7, 10, or 11(d)), the courts should be able to give the wronged party access to a higher court to determine whether an appropriate remedy can be fashioned under section 24(1) of the Charter.³⁸ The Supreme Court of Canada recently did so in the case of a publication ban.³⁹ Further, there are judicial councils. Obviously, the judge cannot argue that he or she has judicial immunity from such a procedure.⁴⁰ And, in my view, as previously discussed, the judge should have no testimonial immunity before such a body. One of the tradeoffs in maintaining absolute judicial immunity should be to ensure that the disciplinary process is an effective one.

Finally, there is the question of criminal liability. There can be no criminal immunity for conduct that occurred before the judge’s appointment. It is not necessary to remove the judge from the bench before prosecuting.⁴¹ As we will see in a later section, Landreville J. was prosecuted for conduct allegedly engaged in before his appointment. Similarly, judges can be prosecuted for conduct unconnected with their judicial function. A judge in Newfoundland, for example, was recently prosecuted for improper conduct not involving judicial duties.⁴² The U.S. federal bench had a rash of such cases in the 1980s. The 1993 *U.S. National Commission on Judicial Discipline and Removal* wrote: “In the two hundred years of judicial history prior to 1980, no sitting federal judge was ever prosecuted and convicted of a crime committed while in office. Judges who were accused of serious wrongdoing resigned rather than face an impeachment.”⁴³ “The stunning fact is,” they went on to say, “that since 1980, five sitting federal judges have been indicted, and four convicted, of crimes committed while in office.”⁴⁴

What if the wrongful action is related to the judge's judicial duties? Obviously there can be no immunity for, say, soliciting or accepting bribes.⁴⁵ Some of the U.S. federal cases mentioned above involved such conduct. But if the charge is false imprisonment or assault relating to a judicial action, the answer should be different. One should not permit a person to do through the criminal process what cannot be done through a civil suit.⁴⁶ The tests, such as that proposed by Denning for civil liability (absolute liability if the judge is "acting in the *bona fide* exercise of his office and under the belief that he has jurisdiction") should be equally applicable to criminal liability. Again, there is the question of whether legislation can make the judge criminally liable. In the U.S., it is clear that Congress has this power. In a 1880 U.S. Supreme Court case, it was held that a federal statute making it a misdemeanour with a \$5,000 fine for a judge to breach a civil rights statute relating to the selection of jurors was constitutional.⁴⁷ It is far less clear that the Supreme Court of Canada would arrive at the same result.

5. REMOVAL OF JURISDICTION

One method of interfering with the judiciary is to remove matters from its jurisdiction to other tribunals. Many military dictatorships try to by-pass the existing courts by establishing special *ad hoc* tribunals. The 1983 Montreal Universal Declaration on the Independence of Justice specifically provides that "No *ad hoc* tribunals shall be established" and also that in times of emergency "Civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges."¹ Emergencies were discussed in an earlier section, where it was concluded that Canadians are now fairly well protected against executive tyranny by a combination of Parliament and the judiciary. Another danger is the abolition of courts or tribunals and the non-reappointment of its members, a topic of considerable discussion and debate in Australia.²

In this section, we concentrate instead on less dramatic issues, involving the transfer of jurisdiction from the superior courts to other tribunals. There is a long line of cases under section 96 of the Constitution Act on this question in Canada, and, once again, all I can do here is to raise the issues in a general way.³

Section 96 provides that appointments to the superior and county courts are to be by the federal government. This provision could easily be evaded if the provinces could simply increase the jurisdiction of their provincial courts and tribunals. So section 96 has been interpreted by the courts to prevent this. To quote Peter Hogg: "If a province invests a tribunal with a jurisdiction of a kind that ought properly to belong to a superior, district or county court, then that tribunal, whatever its official name, is for constitutional purposes a superior district or county court" the members of which can be appointed only by the federal government in conformity with section 96.⁴ If the provinces could establish such tribunals at will, "[w]hat was conceived as a strong constitutional base for national unity through a unitary judicial system", Dickson J. stated in a 1981 case, "would be gravely undermined."⁵ As a leading constitutional

law casebook states, “the constitutional goal here is to preserve, through institutional design, legalism, or the rule of law.”⁶

But as Hogg points out, “the difficulty lies in the definition of those functions that ought properly to belong to a superior, district or county court...and it is difficult to predict with confidence how the courts will characterize particular adjudicatory functions.”⁷ I will not go through the many cases on the subject. Two from the early 1980s, however, illustrate the effect of the doctrine. In the 1981 *Residential Tenancies Case*,⁸ the Supreme Court of Canada prevented Ontario from setting up a Residential Tenancy Commission and appointing its members with power to settle landlord and tenant disputes and to issue eviction orders. And in 1983, in the *McEvoy* case,⁹ New Brunswick was prevented from setting up a unified criminal court staffed by provincially appointed judges to try all indictable offences (to be exercised concurrently with the superior courts). Constitutional scholars generally criticize the decisions of the Supreme Court on these issues. Hogg calls the judiciary’s concern “extravagant”¹⁰, and Russell states that “section 96 is out of keeping not only with the textbook definition of federalism but with the conception of federalism accepted by most Canadians today.”¹¹

A constitutional solution suggested by the federal Department of Justice in 1983 was to permit the provinces to confer adjudicative powers on provincially appointed tribunals in respect of any matter within the legislative authority of the provinces, but also to provide that any such decision would be subject to review by the superior courts “for want or excess of jurisdiction.” The proposal was not approved, however, at the constitutional discussions that year.¹² Hogg likes the proposal, stating: “This proposal would remove a swamp of uncertainty from our constitutional law, and give to the provinces more security in assigning functions to administrative tribunals.”¹³ Russell is less sure, because the proposal “may also undermine the integration and unity which section 96 has contributed to the Canadian judicial system.”¹⁴ To Russell, “the key might be to change the system of appointing judges so that both levels of government participate in selecting the judges of the provincial superior courts.”¹⁵

Perhaps all that is needed is for the Supreme Court of Canada to be more sensitive to the effectiveness and efficiency of solutions that may not involve the superior courts and to realize that there will continue to be lots of work for superior judges even if some inroads are made into their jurisdiction. There is no danger that the superior courts would, to use Professor Lederman’s language, “continue, if at all, merely as empty institutional shells”¹⁶. There are indications that the Supreme Court is moving in the direction of this greater sensitivity to the usefulness of provincial tribunals. In *Sobey Stores*¹⁷ in 1989, the Supreme Court upheld the power of a Nova Scotia tribunal to reinstate a worker dismissed “without just cause” and to order the payment of lost wages. Wilson J. stated for the majority of the Court: “although the Labour Standards Tribunal exercises a jurisdiction broadly conformable to that of s. 96 courts at the time of Confederation, and although in doing so it performs a judicial function, it does so as a necessarily incidental aspect of the broader social policy goal of providing minimum standards of protection for non-unionized employees.”¹⁸ The rest

of the Court agreed with the result, holding that "the tribunal does not conform to the power or jurisdiction of a s. 96 court in 1867."¹⁹

The courts may be more willing to continue to uphold such legislation in the future because of the 1981 Supreme Court of Canada case of *Crevier*,²⁰ which held that the provinces (and, no doubt, even the federal government) cannot prevent judicial review by superior courts of decisions of such tribunals based on excess of jurisdiction. Ensuring judicial review is therefore another way of protecting superior court jurisdiction. The unanimous decision was given by Laskin C.J.C., who stated: "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 Court."²¹ It is interesting to note, as Katherine Swinton has pointed out, that "Laskin the academic had believed there was no constitutional protection for judicial review, but Laskin the judge held that judicial review of the decisions of provincial administrative tribunals for jurisdictional error was guaranteed by section 96."²² The effect of the decision, therefore, coupled with greater scope in the creation of provincial tribunals is that the Supreme Court has, it seems, achieved much of the object of the proposed 1983 constitutional amendment.

The final area to be discussed is the growing tendency of the courts to prevent the legislature from cutting down on judicial discretion. The device used is the Charter. The leading case is *The Queen v. Baron*,²³ in which the Supreme Court of Canada in 1993 unanimously struck down a section of the Income Tax Act that had said that a judge *shall* issue a search warrant when certain conditions were found by the judge. Sopinka J. stated for the Court that the provision "violates s. 8 of the Charter [the search and seizure section] in so far as it removes the residual discretion of the issuing judge to refuse to issue a search warrant in the proper circumstances, notwithstanding that the statutory criteria for its issuance have been met."²⁴ The Court decided the issue under section 8 of the Charter and did not find it necessary to decide whether section 7 of the Charter was also violated.²⁵ "Nor do I propose, to consider separately," Sopinka J. went on, "whether the impugned section improperly interferes with judicial independence."²⁶ "In my opinion," he added, "this is merely another ground which supports my conclusion with respect to the importance of a residual discretion."²⁷ It is likely that we will see other cases in which the denial of a discretion is considered a breach of the Charter. Earlier Supreme Court cases, such as the evidence case of *Seaboyer*²⁸ and the compulsory commitment case after a finding of insanity of *Swain*,²⁹ are further examples of the Court's dislike of fixed legislative rules telling them they *must* do something.

One interesting area in which the issue may arise is in sentencing. Could Parliament constitutionally control sentences by statutory minima or by a sentencing commission? If the minimum sentence is considered too high when applied to all offenders, the Supreme Court will strike it down, as they did in 1987 in the *Smith* case³⁰ with respect to the minimum seven-year sentence for importing narcotics. Will they go further and say that controlling judicial sentencing violates section 7 of the Charter or

general concepts of judicial independence?³¹ The issue has arisen in Australia and, of course, the United States, with its many sentencing commissions. The Australian High Court concluded in one case that “It is not...a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.”³² And the U.S. Supreme Court decided (8-1) in *Mistretta v. U.S.*³³ in 1989 that the U.S. Sentencing Commission, which has the power to promulgate binding sentencing guidelines, does not violate the U.S. Constitution. The issue has come up in England and has been resisted by the judiciary in extra-judicial statements.³⁴

Andrew Ashworth, however, in his book *Sentencing and Criminal Justice* argues that “any claim that a wide sentencing discretion ‘belongs’ to the judiciary is without historical foundation.”³⁵ “It gains its plausibility,” he states, “only from the legislature’s abandonment of minimum sentences in the twentieth century, and from the more recent orthodoxy in criminal law reform, which is to avoid a plethora of narrowly defined offences with separate maximum sentences and to prefer a small number of ‘broad band’ offences with fairly high statutory maxima.”³⁶ His solution, as would be mine, is not to control sentencing to too great an extent through legislation, but to ensure more dialogue on the issues between the judiciary and the executive.³⁷ Ashworth states: “One step would be to form a kind of ‘Judicial Conference’ to collate and express judicial policy on certain issues. A bolder step would be to recognize the importance of exchange of information and views by instituting them regularly at the highest level.”³⁸ Perhaps in Canada, the new Law Reform Commission could take on the role of organizing such meetings, as well as provide studies and material that could assist the judiciary in their sentencing role.

CHAPTER THREE: SECURITY OF TENURE

Security of tenure is one of the three essential conditions of judicial independence identified by Le Dain J. in *Valente*.¹ “Security of tenure,” he stated, “because of the importance that has traditionally been attached to it, must be regarded as the first of the essential conditions of judicial independence for purposes of s.11(d) of the Charter.”² The historical development of the concept was briefly set out in chapter 1. The 1701 Act of Settlement³ established for the first time in England on a statutory basis that superior court judges were lifetime appointments during “good behaviour.” The Act did not apply to Canada, and it was not until 1834 that a comparable provision was introduced in Canada.⁴ The concept was carried into the British North America Act of 1867.⁵

In this chapter, we examine three aspects of security of tenure: retirement age; supernumerary status; and incapacity.

1. RETIREMENT AGE

Superior court judges in Canada were lifetime appointments until a constitutional amendment was passed in 1960 requiring retirement at age 75.¹ The Constitution Act, 1867 now provides that “A Judge of a Superior Court...shall cease to hold office upon attaining the age of seventy-five.”² County and district court judges,³ as well as judges of the Federal Court of Canada,⁴ until recently, had by statute a retirement age of 70. In 1985, however, a federal court judge successfully challenged the Federal Court Act provision requiring retirement at age 70 on the basis, *inter alia*, of section 15 of the Charter—the equality section.⁵ The decision was not appealed by the government.⁶ Subsequently, in 1987, Parliament (with the consent of all parties)⁷ passed legislation resulting in raising the retirement age of all federally appointed judges to 75.⁸ Thus, today, all federally appointed judges can stay in office until age 75.

Retirement age for provincial court judges varies across the country. In some provinces, for example, it is 65,⁹ in others, 70,¹⁰ and in some, there is no retirement age at all.¹¹ Many jurisdictions permit various forms of extension of the retirement age in individual cases.¹²

Why do we care about a specific age of retirement? It is—to repeat the point made earlier—because we want judges to act independently, without worrying about whether their decisions will find favour with the government. If a judge’s future term of office were dependent on the government’s approval, there would be a danger that decisions would improperly be made to favour the government. Whether or not such decisions would actually be made, there would be a perception of partiality. Thus, the public would tend to lose confidence in the administration of justice. The ability of the

government to extend a term is not significantly different from the ability of the government to curtail a term. Both put pressure on the judge to favour the government.

Until the constitutional amendment in 1960 reducing the retirement age to 75, there were many discussions in Parliament about how the government could induce judges to retire. An amendment in 1903, for example, provided a pension of full salary—later reduced to two-thirds¹³—if the superior court judge had served 30 years on the bench, or was age 75 and had served 20 years, or was age 70 and had served 25 years.¹⁴ Apparently, some judges were still inclined to hang on too long, and the government introduced legislation in 1933 to provide that judges who did not retire at 75 would receive only two-thirds of their salary—the same as they would receive as a pension.¹⁵ The Bill passed the House, but was defeated in the Senate.¹⁶ One minister of justice in the 1930s was even inclined to provide full pay for judges who retired at 75 and two-thirds pay for those who did not, but he did not put this forward in the Bill.¹⁷ Finally, in 1960 the constitutional amendment was passed by the U.K. Parliament requiring retirement at age 75. Parliament had by statute in 1927 already imposed a retirement age of 75 on the Supreme Court of Canada.¹⁸

U.S. federal judges do not have a mandatory retirement age. Theirs is a lifetime appointment.¹⁹ But one strong inducement to retire is that retirement is based on full salary.²⁰ And if the judge takes what is called “senior status” at age 65 and is available to hear cases, the judge can keep his or her office and continue to get the salary increases given to other judges.²¹ As is well known, however, judges of the U.S. Supreme Court are less inclined to retire than other judges.²² There is no “senior status” category for Supreme Court judges.

The vast majority of individual states have a mandatory retirement age, and in most cases the age is 70.²³ In 1991, the U.S. Supreme Court upheld a Missouri constitutional provision requiring retirement of state judges at age 70.²⁴ O'Connor J. stated for the Court: “The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age.”²⁵ Other countries tend to have a lower retirement age than Canada. In Australia and Israel,²⁶ for example, it is 70, in Germany and New Zealand, 68, and in France, 65, except for the Chiefs of Jurisdictions, who retire at 68.²⁷

England established mandatory retirement at age 75 for High Court judges in 1959²⁸ and there was a lower age for county and circuit judges.²⁹ The age of retirement for High Court judges was lowered to 70 in 1993,³⁰ with the possibility of continuing on an *ad hoc* basis at the request of the Lord Chancellor until 75.³¹ This change came into effect on March 31st, 1995.³² The provision, which was not retroactive and therefore applied only to future appointments³³, was apparently supported by the judges themselves.³⁴ Some groups wanted the retirement age to be even lower. The influential groups, Justice and the Bar Council,³⁵ recommended that the age be 65, as did a number of speakers in the Commons and the Lords.³⁶ Judges already in office

do not have to retire until 75, although it is likely that many will feel an obligation to conform voluntarily to the new legislative policy.

It is well known that civil servants, university professors, and the vast majority of workers retire at an earlier age than 75, or even 70. Justice La Forest stated for the majority of the Supreme Court of Canada in the 1990 mandatory retirement case of *McKinney* that "Generally, it seems fair to say that 65 has now become generally accepted as the 'normal age' of retirement."³⁷

A number of chief justices have told me that it is often in the age group of 70-75 that they experience problems with judges in terms of energy, flexibility, and awareness of changing social mores, as well as the normal physical deterioration involving, for example, hearing and memory. Of course, one can point to a number of clear exceptions, but the fact that people point out exceptions perhaps says something about others in the group.

In the Constitutional Amendment Bill of 1978, the Trudeau government proposed that all future federally appointed judges *must* retire at age 70.³⁸ This was not, however, part of the 1982 constitutional package. One therefore wonders why the Canadian Government in 1987 increased the mandatory retirement age of all federally appointed judges from 70 to 75.³⁹ County and district court judges made up a substantial proportion of all federally appointed judges. Even if there were compelling arguments to treat Federal Court judges the same as superior court judges, these arguments were not applicable to county and district court judges as they have never been considered superior court judges within the meaning of section 99 of the Constitution.⁴⁰ As previously mentioned, the change was made in response to the trial court decision holding that a section of the Federal Court Act was in breach of the Charter.⁴¹ This is clear from the discussion in Parliament, where the parliamentary secretary to the Minister of Justice stated on second reading: "The Bill before the House today...is an attempt to apply equality and equity to the retirement age of federally appointed judges...When the clause dealing with...ages of retirement [for Federal Court judges] was implemented in 1971, the validity of the legislation was never questioned. However, what was valid at the time is no longer so because of the Canadian Charter of Rights and Freedoms. Charter Section 15 did constitute one of the sound arguments to contest these two retirement ages for Federal Court judges."⁴²

Why the judgment was not appealed is not clear. There appears to have been an agreement to be bound by the trial court ruling to the extent that it applied to Federal Court judges.⁴³ But the government went further and made the retirement age of county and district court judges the same as for superior court judges. The parliamentary secretary stated: "We have agreed to introduce the necessary legislative amendments so that judges of the courts in a similar situation will benefit from this ruling."⁴⁴ In my view, it is much more than simply arguable – indeed, I think it is likely, in the light of the later equality decisions⁴⁵ – that the Supreme Court of Canada would have permitted different retirement dates for different categories of judges, and even different retirement dates for different judges of the same court, which had been

brought about by making the law applicable only to future appointments. Once the government raised the age to 75, however, it became difficult to lower it for existing judges—although this had been done retroactively by a constitutional amendment in 1960 (to lower the age to 75 for all superior court judges). The government, in my opinion, should have left the age of retirement for county court judges at 70 and decreased the retirement age for all future superior court judges to 70. But this would have required a constitutional amendment, not an easy prospect at the time.

Seventy seems to me to be a desirable retirement age for the judiciary. Some might suggest that it be lower, but this would cut off a group that possesses experience, maturity, and judgment, without in most cases significant physical deterioration. Capable judges who retire at the age of 70 will have increasing opportunities—at least in the larger centres—to contribute to society through the emerging and growing dispute resolution area; but it will be the parties who will choose the judge. In my view, Canada should follow England's lead and pass a constitutional amendment reducing the retirement age for all future appointments to age 70.

2. SUPERNUMERARY STATUS

Federal legislation was first enacted in Canada in 1971 to recognize the office of supernumerary judge.¹ A superior court judge can elect to take supernumerary status at age 65 if the judge has spent 15 years on the bench, or at age 70 if the judge has served for 10 years. Thus a superior court judge electing to take this status at age 65 could serve in that capacity for 10 years.² The salary for a supernumerary judge is exactly the same as that of a regular full-time judge.³ The parliamentary secretary to the Minister of Justice stated on the second reading of the Bill in 1971 the purpose of the new supernumerary status: "an experienced group of judges will be available to assist in special cases of long duration and to meet the peak workloads of the court."⁴ When first enacted, supernumerary status was available only to superior court judges at age 70 with 10 years' experience.⁵ In 1973, it was extended to those who were 65 with 15 years' experience.⁶ County and district court judges appointed from 1975 on also had the right to choose supernumerary status at age 65 after 15 years on the bench, but a person appointed after 1971 could serve as a supernumerary for only 5 years because in 1971, as we saw in the previous section, the age of retirement for all future county court appointments was 70 years of age.⁷ In 1987, however, county court judges were put on the same footing as superior court judges, that is, made subject to compulsory retirement at 75, with the possibility of 10 years as a supernumerary judge from age 65.⁸

Virtually all eligible federally appointed judges in Canada take supernumerary status.⁹ Almost twenty percent of federally appointed judges are currently supernumerary.¹⁰ It is an attractive position because the workload is substantially decreased,¹¹ but the pay remains the same. In most cases, the judge continues physically to occupy the same office. There is also subtle pressure to become a supernumerary judge from the judge's

colleagues because a replacement judge can then be appointed by the government, thus decreasing the collective workload.

The cost of the scheme to the federal government is bearable because apart from the salary of the new judge they pay only the difference between the pension (2/3 of salary) and the full salary of the supernumerary judge, that is, one-third of the salary less the judge's contribution (7% of salary)¹² to his or her pension.¹³

Some provincial governments are somewhat less enthusiastic about the scheme.¹⁴ They have to provide offices, secretarial help, and other costs, for supernumerary judges. In some cases, the number of supernumerary judges can be very significant.¹⁵ One provincial court of appeal, for example, had, at the end of 1992, 13 full-time judges and 9 supernumerary judges.¹⁶ The numbers are increasing. Sixteen percent of the total federally appointed judiciary (including supernumerary judges) had supernumerary status at the end of 1991, and 18% as of April 1, 1995, but it is estimated that 26% of the judiciary might have that status in 2000.¹⁷ In terms of the ratio of supernumerary judges to full-time judges, the percentage of supernumerary judges at the end of 1991 was 19%, at the end of 1994, 22%, and it could be 35% in the year 2000.¹⁸ Further, almost all supernumerary judges remain until the mandatory retirement age of 75 (or until they die). Between 1981 and 1990, the average age at which supernumerary status was relinquished or ceased was 73.6 years.¹⁹ It may be, however, that the average age will go down in the future as judges see greater opportunities to be involved in alternative dispute resolution hearings after retirement.

Some chief justices have also expressed concerns about some aspects of supernumerary status. Some trial division chief justices say that supernumerary status might occur in one region of the province where an extra judge is not needed and that it is practically, if not legally, difficult to have the supernumerary judge sit in another part of the province where the resources are needed. The same problem arises if there is an overabundance of supernumerary judges in the court of appeal and greater need for resources in the trial division.

At least one chief justice of a court of appeal is concerned that the cohesiveness of the court is lost if there are too many supernumerary judges. After all, it is argued, the Supreme Court of Canada does not allow supernumerary status. In the Supreme Court of Canada, nine members of the Court develop the law collectively. Provincial courts of appeal are in effect the final courts of appeal for most matters because of the limited ability of the Supreme Court of Canada to hear very many appeals.²⁰ Thus, it is argued that a provincial court of appeal should collectively decide issues, and, if needed in a particular province, there should be an intermediate court of appeal to deal with the large volume of appeals.²¹ This is the structure in many American states.²²

England recently introduced a limited form of supernumerary status in the 1993 legislation which reduced the age of retirement for future appointments to 70.²³ The legislation provides that service may be continued after the age of 70, but only if the Lord Chancellor (or Secretary of State for Scotland) considers it desirable in the public

interest, and only for periods of no more than a year at a time up to, but not beyond, the judge's 75th birthday.²⁴ Lord Mackay, the Lord Chancellor, told the House of Lords that he believed "that this power would be used sparingly and applied only where it was clearly in the public interest to do so, taking careful account of all the relevant considerations including in particular such things as the health of the judicial office holder in question."²⁵ Presumably, if the period is extended, the judge would carry a full load or close to a full load.

U.S. federal judges can retire at full pay when they have served 15 years and are age 65 or have served 14 years and are 66, and so on. They are then fully retired and do not participate in the work of the court.²⁶ Judges can, however, opt for a category called "senior status."²⁷ Again, as with full retirement, they must have served 15 years and be age 65 or have served 14 years and be 66, and so on.²⁸ The appointment is, like the English rule, a year-by-year appointment.²⁹ It requires the chief justice to certify each year that the justice has performed at least one-third of the work that an average judge in active service would perform in a year.³⁰

There are many advantages in retaining the supernumerary status category.³¹ It provides a pool of experienced judges to assist in the administration of justice, although at a reduced level of participation. As the Crawford Commission stated: "From an economic standpoint, a supernumerary judge represents an efficient use of human resources, and that supernumerary service is quite conducive to the effective administration of the courts, including the reduction of court backlogs and delays."³² At the same time, it gives the judge a useful bridge towards retirement—a feature that assists in the initial selection of judges. It also helps encourage judges to continue as judges, thus diminishing the problems faced when judges retire at an age when they would like to continue to contribute in a substantial way to society and thus seek further employment. In my view, the retirement system should be designed to encourage judges not to seek a third career. Judges deciding cases should not have an eye on future employment and thus have any temptation or appearance of temptation to decide issues in ways that would assist their future plans. This concern does not apply to a third career as an arbitrator. It seems to me that such a career path encourages independent, legally sound, expeditious, sensitive decision-making on the part of a judge. These are, of course, some of the same qualities that litigants would seek in an arbitrator.

On the other hand, a ten-year transitional supernumerary period may be too long. A number of persons indicated to me that it was not uncommon for a supernumerary judge in some provinces in Canada to do little, if any, work, particularly towards the end of his or her period as a supernumerary judge. If *future* retirements were to be at the age of 70, as suggested in the previous section, then the supernumerary period would be only five years—a much more manageable transition period in terms of office facilities and ability to continue to contribute to the court.³³ Of course, a constitutional amendment reducing the retirement age to 70 may be difficult to accomplish. It has been suggested to me by one senior government official that it may be constitutional for the federal government to change the Judges Act to provide, for

example, that appointees who elect supernumerary status at age 65 or, perhaps, after, be permitted to do so only on condition that they elect to hold the position for a maximum of five years. Would this be practical, even if it were constitutional? Would it have unintended consequences, such as causing judges to stay to age 75, without electing supernumerary status? Should it apply only to future appointments? The idea is worth careful consideration and where these questions can be explored in depth.

There should, of course, be an obligation for supernumerary judges to respond reasonably to the needs of the court. Court of appeal judges, for example, should not be able to reject reasonable requests to take trials and trial judges should have an obligation to respond to reasonable needs in other localities. There should also be a uniform rule, preferably developed by the Canadian Judicial Council, as to what a minimum workload should be.³⁴ There is now significant variation from province to province.³⁵ Somewhere around one-half would seem to me to be the desirable amount. Perhaps, as in the U.S. federal system, some annual certification by the chief justice should be used. Some courts have adopted written policies on supernumerary status. The Saskatchewan Court of Appeal, for example, recently developed a document which states, in part: "A supernumerary judge should be assigned on a regular basis in the rotation. He or she should expect to sit not less than 50% of the time and should be available at any time during our regular 10-month sitting period. In the event that an appellate judge is required to assist Queen's Bench, then a supernumerary judge should also be available for this type of duty...No prolonged absence of appellate supernumerary court judges should be permitted because of the need to keep abreast of current law and any changes in the law."³⁶

Whether there should be the possibility of calling the judge back for further service after 70, as in England, is a difficult issue. In my view, it is probably better to have a fixed rule of retirement at 70. Should there be a possible exception of calling a judge back for a particularly long trial? In such a case, the judge could be paid on a *per diem* basis and the payment be added to the pension up to the salary of a full-time judge. But it is probably not a good idea to have the judge's remuneration determined by the length of the trial, because this would create an incentive to have long trials. It would be better to allow no exceptions. The judge who is capable of handling a long trial could make himself or herself available as an arbitrator after retirement—as many former judges now do. As previously stated, counsel would thus be the persons to determine the capability of the judge to handle the dispute.

The provinces now have a variety of techniques to extend a judge's period of service. In the new Ontario legislation, the retirement age is 65, but it can be extended to 75.³⁷ The decision to continue from year to year is made by the Chief Judge,³⁸ and in the case of the Chief Judge or associate chief judge the annual approval is by the Ontario Judicial Council.³⁹ The budget for the extension would be provided by the government, but presumably the money would be provided because of the needs of a particular locality and not because of the ability of a particular judge. Other provinces, however, give the Cabinet the say on whether there should be an extension. Nova

Scotia⁴⁰ and Quebec⁴¹, for example, permit the Cabinet to extend the period. In others, such as P.E.I.⁴² and Newfoundland,⁴³ there is no discretion for an extension.

In my view, the Ontario system is the desirable one, although, as discussed above, the present ten-year period of extension is longer than I believe is desirable. Extension by the Cabinet makes decisions by those judges clearly vulnerable to attack under s.11(d) of the Charter. Such extensions by the Cabinet were declared *ultra vires* by Goodridge J. (as he then was) in Newfoundland in 1985.⁴⁴ The Supreme Court would no doubt decide the issue the same way. *Valente*⁴⁵ in 1985 did not have to decide the issue because the Ontario legislation⁴⁶ giving the executive the power to extend a term had been changed after the Ontario Court of Appeal decision⁴⁷ to give the judiciary and the Judicial Council the authority to extend a judge's term.⁴⁸ Moreover, the judge who was challenged in *Valente* was not a supernumerary judge.⁴⁹ Nevertheless, it is clear that the Supreme Court would now strike down such a section if the occasion arose. Le Dain J. stated:⁵⁰

With the greatest respect for the contrary view, where, as in the case of provincial court judges at the time [the judge] declined jurisdiction, the Legislature has expressly provided for two kinds of tenure—one under which a judge may be removed from office only for cause and the other under which a judge of the same court holds office during pleasure—I am of the opinion that the second class of tenure cannot reasonably be perceived as meeting the essential requirement of security of tenure for purposes of s.11 (d) of the Charter.

3. INCAPACITY

What should be done with a judge who is incapacitated or disabled because of illness or infirmity? If the judge does not resign, the issue is now dealt with as a question of “good behaviour”, with the possibility of removal by Parliament because of a breach of “good behaviour”.¹ In the *Gratton* case—to be discussed in more detail in chapter 5—Mr. Justice Strayer held that “a failure to perform the functions of the office by reason of incapacity or disability due to a permanent infirmity...can amount to a breach of good behaviour.”² It seems inappropriate and unseemly, however, to categorize a physical or mental illness or condition, or even the failure to resign voluntarily, as constituting a breach of good behaviour. Moreover, in the light of advances in medical knowledge and adaptive technology, the concept of “permanent disability” today seems out of place for many physical and mental conditions, whatever may have been the case in the past.

Many judges in Canada, when faced with a serious medical condition, do, in fact, resign. A judge will receive a full pension in such a case, regardless of the years of service. Section 42(1)(c) of the Judges Act provides a full pension for “a judge who has become afflicted with a permanent infirmity disabling him from the due execution

of the office of judge and resigns his office."³ In the years 1984 to 1993, inclusive, 35 federally appointed judges resigned under this section of the Judges Act.⁴ Seven of these judges were in their 50s. As we will see in the next chapter, the provision of a pension by the government in such cases is now mandatory. Prior to 1981, however, the Judges Act stated that the government "may grant" a full pension.⁵ But in 1980 the Federal Court of Canada interpreted the word "may" as meaning "shall"⁶, and in the following year the Act was amended to substitute "shall" for "may".⁷ The mandatory nature of the pension provided a considerable incentive to resign to a judge "afflicted with a permanent infirmity disabling him from the due execution of the office of judge."⁸ The Minister of Justice will, in appropriate cases, seek a second opinion on the question of the disability,⁹ and the Cabinet may, instead of giving a pension, grant a leave of absence for a period with pay.¹⁰

Until 1987, there was also an implicit threat under section 65 of the Judges Act¹¹ that the Canadian Judicial Council could, after an inquiry, conclude that the judge "has become incapacitated or disabled from the due execution of the office of the judge by reason of...infirmity" and recommend that the judge be removed from office and cease to be paid any further salary. If the Cabinet agreed with the Judicial Council, the judge would cease to receive any further salary and would receive a pension. Although apparently never carried out,¹² the threat to do so would effectively force incapacitated or disabled judges to resign and take a pension.¹³ Because of serious doubts about the constitutional validity of the provision it was dropped from the Judges Act in 1986.¹⁴ The existence of the section until 1987 explains why cases such as *Gratton* have appeared only in recent years. The 1993-94 C.J.C. Annual Report states that the case "was the first time in the history of the Council that a formal investigation has been undertaken to consider such an allegation."¹⁵

Section 65 had been first enacted in 1922,¹⁶ and applied to any federally appointed judge "incapacitated or disabled" because of age or infirmity. It was probably unconstitutional because the decision was made by the executive rather than the judiciary. Professor Lederman stated in 1956: "Perhaps there is need for a speedy procedure for removal in extreme cases of disability resulting from age or infirmity, but salary-stoppage by the executive is no way to do it and is probably *ultra vires*."¹⁷ "If there is to be a non-parliamentary procedure at all," he added, "the last word should rest with other superior-court judges."¹⁸ In 1971, the Canadian Judicial Council was interposed as the effective last word, but instead of limiting the pay-stoppage without a parliamentary address to cases of medical incapacity or disability, the legislation allowed it for all cases dealt with by the Canadian Judicial Council, including improper conduct.¹⁹ Somebody seems to have given the government bad advice on this issue. Chief Justice Deschênes was surely correct in his 1981 report that the section "should be repealed on constitutional grounds"²⁰, as was done in 1987.²¹ Deschênes said that the provision "amounts to constitutional cosmetics and Parliament has no right to indulge in it."²² This opinion is shared by both Professor Hogg²³ and Professor Russell.²⁴ The question is, however, whether it would be unconstitutional if it was limited strictly to incapacity or disability, with the

determination made by the judiciary. Let us look at the U.S. federal system of dealing with such issues without the necessity of using the congressional impeachment process.

The U.S. federal system provides an alternative to ours. There, a judge who “becomes permanently disabled”²⁵ may retire and receive a full pension (i.e., full salary) if the judge has served ten years in office.²⁶ If the judge has served less than ten years, then the judge receives only half the pension.²⁷ So far, the arrangement is like the Canadian one, except that length of service in the United States is a factor in the amount of the pension.²⁸

If the judge refuses to resign, the Judicial Council of his or her circuit can certify by a majority vote that the judge is permanently disabled.²⁹ The Council, composed of trial and appeal judges,³⁰ would understandably be slow to characterize one of their number as permanently disabled. The U.S. President is then authorized (if the President considers that a replacement is needed) to make a further appointment in the usual way.³¹ The permanently disabled judge will not in such a case be replaced when the judge subsequently dies, retires, or resigns.³² The threat of such a certification probably induces most judges to resign. As a result, as of 1993, the statute has been applied only in a handful of cases.³³ But there are many cases of informal pressure to resign exerted by chief judges.³⁴ The incapacitated judge remains a judge³⁵ and can presumably participate in the work of the court, if he or she recovers. Until the judge recovers, however, no cases need be assigned to the judge. Thus, in the U.S. federal system, incapacity is not handled through an adversarial “good behaviour” disciplinary process.

The American Bar Association’s 1994 Model Rules of Judicial Disciplinary Enforcement also have separate rules for cases of disability.³⁶ The rules make it clear that a hearing on a judge’s incapacity is not a disciplinary proceeding. So, for example, incapacity proceedings remain confidential throughout. The Model Rules use the word “incapacity” rather than “disability”. A judge who co-chaired the subcommittee that brought in the new procedures states: “The subcommittee wanted to distinguish between disability and incapacity. Many fine judges suffer from a disability. A disability does not necessarily disqualify a person from serving as a judge.”³⁷ This distinction makes good sense and section 65(2) of the Judges Act³⁸ should be amended to reflect this distinction. Rather than stating that proceedings can be taken against a judge who “has become incapacitated or disabled from the due execution of the office of judge by reason of...age or infirmity,” it could be redrafted to provide for proceedings when a judge “has become incapacitated from the due execution of the office of judge by reason of...illness or disability.” The key issue is incapacity, not disability.

Let us explore a fundamental question. Why should a judge with a serious medical problem have to leave the bench permanently? The judge may recover from his or her disability in the future. It is wrong to assume in today’s society that most such conditions are necessarily permanent. This is particularly so if the condition is something like alcoholism or psychiatric illness. I exclude clear cases where there is

absolutely no hope of recovery. Would it not be better to place an incapacitated judge after, say, a year or two's incapacity, on long-term disability until the judge retires, resigns, or dies? The incapacitated judge would remain a judge. Some procedure such as in the U.S. federal system providing for a replacement would be desirable in such a case. It also seems desirable that the decision, based on medical advice, be made by the judge's colleagues, as in the U.S. federal system. As in other parts of Canadian society, the payment should be somewhat less than the normal salary in order to provide a continuing incentive to return to work.³⁹ (I am assuming full medical coverage.) It could be somewhere between, say, a regular pension of two-thirds of salary and full salary, perhaps about 75% or 80% of salary. The judge could continue to contribute to the work of the court to the extent of his or her ability. With reasonable accommodation, the judge could return to his or her normal full-time work. The long-term disability protection should apply from the moment of appointment. (I am assuming there was no deception in the application for the position.) Provision could, perhaps, be made to permit judges to purchase additional insurance coverage, bringing them even closer to regular judicial salaries. The government itself could possibly act as the insurer for this additional coverage, which private insurers apparently do not offer. Another change that should be considered in any new provision is to provide for a mechanism for resignation by a judge who is so disabled that he or she is incapacitated from resigning. England passed legislation in 1973⁴⁰ to handle this problem. In such a situation, the Lord Chancellor may declare the judge's post to be vacant, subject to medical evidence and to the approval of the relevant senior judge.⁴¹

Such an overall scheme—which obviously would require more expertise than I have available to work out details—would mean that the judge's incapacity would not be dealt with as a matter of discipline. It would also prevent the unseemly spectacle of a judge retiring with a full pension on the basis of a permanent disability and then commencing a new career. This is one of the points made by Kim Campbell, the then minister of justice, in her remarks at the Annual Meeting of the Canadian Judicial Council in March, 1992: "Under the law as it stands therefore," she stated, "a pension must be granted on the furnishing of proof of disability. There is no means thereafter of determining whether the disability persists—and in some cases, it appears a judge has made a full recovery and moved on to other things."⁴² Perhaps, apart from the scheme suggested above, there should be some way of reducing a full judicial disability pension to take into account in a reasonable manner future employment income. The scheme would also prevent a judge who should be dealt with through the discipline process from being able to avoid the purview of the Canadian Judicial Council by resigning and being granted a "disability" pension.⁴³

Whether such a scheme would be held to be constitutional is, of course, uncertain. Some would argue that the only constitutional route envisioned by the Constitution for federally appointed judges is through a joint address by both Houses of Parliament.⁴⁴ It is true that it is not mentioned in the Constitution, but long-term incapacity was probably not considered a major issue in 1867. When a person was incapacitated through a major illness, there was a significant probability that the person would not live very long or recover mental or physical capacity. That, of course, is not true today.

I would hope that the Supreme Court of Canada would interpret the Constitution reasonably and not hold the type of scheme discussed above to be a violation of section 99 of the Constitution. In *Beauregard*,⁴⁵ the Supreme Court of Canada upheld the system of contributory pensions, even though it was not part of pension schemes in 1867. They are likely to do the same with a reasonable long-term disability scheme. It should also be noted that in *Valente*,⁴⁶ one of the objections made by those attacking the independence of the Ontario provincial court judges was that they were subject to the same sickness and disability scheme as civil servants.⁴⁷ The objection, however, was not considered sufficiently important to be discussed by Le Dain J.

Conclusions to this chapter will be combined with those in the next chapter dealing with financial security.

CHAPTER FOUR: FINANCIAL SECURITY

In *Valente*, Mr. Justice Le Dain, after discussing security of tenure, stated with respect to financial security:¹

The second essential condition of judicial independence for purposes of s.11(d) of the Charter is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.

We will first examine security of salary and other remuneration and then turn to security of pension.

1. PAY

There is, of course, a close connection between judicial salaries and judicial independence. As we saw in chapter 1, if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary. As Alexander Hamilton stated: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."¹ The Act of Settlement of 1701 therefore provided that salaries of judges in England should be "ascertained and established"², and section 100 of the British North America Act states that salaries "shall be fixed and provided by the Parliament of Canada."³ Further, the Constitution of the United States provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁴ We will return to the question of reducing salaries later.

A. Level of Pay

We should be concerned not only about the process of establishing pay, but also about the level of pay. Just as we want good pensions for judges so that they are not worried unduly about their *future* financial state, we want good salaries so that judges are not unduly worried about their *present* financial state. In the 1880s, for example, the salaries of Supreme Court of Canada judges were so low that all the judges but one were heavily indebted to their banks.⁵ We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.

There are, of course, other reasons why judicial salaries should be better than just adequate. We want the judiciary to be able to afford to live in a reasonably dignified manner. They are important figures in society. English judges in the eighteenth century were paid very high salaries. In 1832, a superior court judge's salary in England was set at £5,000⁶, an enormous sum at the time. (In earlier years it had been even higher.)⁷ Over the years, however, the salary of a High Court judge in England remained the same and was therefore subject to serious erosion. It was not increased above £5,000 until 1954.⁸ No doubt it was thought that setting too high a salary was inappropriate. As one Canadian member of Parliament stated many years ago: "A judge would be quite as well respected if he did not drive a fine pair of horses, or give balls; a judge is respected when he gives good judgments and attends faithfully to his duties."⁹ Finding the right balance between moderation and extravagance is not easy.

A very important reason for good judicial salaries is, of course, to enable the recruitment of excellent candidates to the bench.¹⁰ In the past, this has been a significant problem in Canada. Prime Minister R.B. Bennett, for example, stated in 1932 that "the inadequacy of the salary makes it impossible to attract to the bench the best legal minds we have."¹¹ One wants salaries to be high enough, when combined with generous pensions, to attract a good pool of excellent candidates. Of course, not every top lawyer will be attracted to the bench, even if the salary were substantially higher than it is. Salaries for the Supreme Court of Canada should be—as they are—significantly higher than for other judges because in that court one wants to ensure that the pool includes most of the *very* best. (A puisne superior court judge in Canada is now paid \$155,800 a year, whereas a Supreme Court of Canada judge receives \$185,200.)¹² Similarly, in my opinion, judges of courts of appeal should be paid somewhat more¹³ than judges in trial courts. This is the pattern in England and the United States¹⁴ and it should be adopted here. A differential would have been difficult in the past when there was no distinction in function in some provinces between court of appeal and trial judges. Moreover, the distinction between court of appeal and superior court trial division judges was not as pronounced in the past—at least in terms of numbers—before the merger of county and district courts with superior courts. County and district courts no longer exist in Canada.

Let us first look at levels of pay and then at methods of setting those levels. The most recent federal Triennial Commission, the Crawford Commission, which reported in 1993, did not recommend any increase in pay. They were of the view that "an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of federal public servant, the Deputy Minister 3, commonly referred to as DM-3."¹⁵ They then found that judicial salaries—at present \$155,800—were in fact \$500 above the DM-3 mid-point and that "judges' pensions, allowances and other benefits, when considered in the aggregate, are certainly no less generous than those of the DM-3s."¹⁶

The judge's salary is, of course, subject to full income tax.¹⁷ Such a tax was upheld by the Privy Council in 1937.¹⁸ Two years later, the U.S. Supreme Court also upheld the taxation of judges,¹⁹ overruling an earlier case.²⁰ "To subject them to a general

tax", wrote Frankfurter J. for the majority, "is merely to recognize that judges are also citizens."²¹ There are also, as we have seen, deductions for pensions.²² Moreover, there are very few ways to reduce a judge's taxable income. Tax-deductible R.R.S.P. contributions, which in the past had the effect of lowering the amount of taxable income,²³ can no longer be made by judges (apart from the \$1,000 available to all taxpayers). At the same time, the judge is unable to earn additional salary. This was formally established by legislation in 1905, at a point when judicial salaries were increased.²⁴ So the actual takehome pay is not as large as the gross salary would suggest. It is the pension that is perhaps the major *financial* consideration in accepting an appointment. This will be discussed in the following section.

The Crawford Commission did not discuss, but was aware of, salaries of comparable judges in other jurisdictions, particularly in the United States and England.²⁵ Canadian salaries are roughly equivalent to the salaries of U.S. federal judges.²⁶ Salaries are substantially above the salaries of English county court and district judges, but below those of English High Court judges.²⁷ (There are under 100 High Court judges in England, compared to about 950 superior court judges in Canada).²⁸ It is difficult, however, to compare the earnings of judges in different countries because of differences in pension arrangements, taxes, allowances, and other factors, such as the cost of living.

There are a great many other considerations which should properly affect the appropriate level of salary. The state of the economy is relevant because, if bad, it affects the ability of the state to pay the amounts requested, increases the number of candidates in the pool of applicants, and creates a climate in which substantial increases seem inappropriate. The Ontario committee reviewing applications for federal appointments, for example, has gone over about 750 applications in the past four years, according to the person who chaired the committee.²⁹ When I put this fact to persons knowledgeable about the process in some of the other provinces, I was told that the number of lawyers applying for federal appointments in their provinces has been proportionately even higher than in Ontario. One problem is that economic conditions, lawyers' incomes, and the cost of living vary across the country. At one time, differentiations were made by the federal government from province to province and, for county court judges, within provinces and even according to length of service,³⁰ but this has been eliminated, except for an extra non-accountable allowance for federal judges in the Yukon and Northwest Territories.³¹ Of course, in setting salaries for provincially appointed judges, a province will rightly take into account economic conditions in the province itself.³² Another factor is the changing nature of the work done by the judiciary. Certainly, the responsibility of the judiciary at all levels has increased because of the Charter. And the jurisdiction of provincial court judges has increased significantly in the past decade.³³ A significant number of resignations from the bench, such as there was in the earlier years of this century in the United States,³⁴ would be a very relevant factor in setting the appropriate level of compensation. The infrequency of resignations in Canada is not, however, a particularly strong indication that salaries are acceptable, because of the lure (or trap) of the eventual very generous pension and restrictions on the ability of the judge to return to practice.³⁵

Does the level of remuneration for judges today affect judicial independence? It is difficult to argue that it does for federally appointed judges in Canada in the light of the actual salary received and the eventual pension, the relationship of their salaries to the salaries of very senior civil servants³⁶ and to judicial salaries in other countries, the number of applications from highly qualified lawyers, and other factors. This is not to say, however, that salaries for superior court judges are at the optimal level in the light of the many considerations—for example, the effect of salaries on increasing even further the pool of excellent candidates—discussed earlier. I leave that to others to decide. I am concentrating here on issues of judicial independence. There is certainly more concern about judicial salaries at the provincial level in relation to judicial independence, as a number of provincial commissions have observed.³⁷ Many senior provincial government officials, however, ask rhetorically how provincial court judges' salaries can be said to affect judicial independence when they are higher than the salaries of most deputy ministers in the province. Nevertheless, within limits, the greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence—for our sake, not for theirs. Again, I leave it to others to determine what provincial court salaries should be.

B. Establishing Remuneration

Let us turn to the issue of techniques for setting pay, which today has perhaps greater relevance to judicial independence in Canada than the actual level of the salaries. In 1981, Parliament established the Triennial Commission procedure for federally appointed judges, whereby every three years the government sets up a commission of between three and five members “to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges’ benefits generally.”³⁸ The Commission must submit a report to the Minister of Justice within six months after being appointed, which is then laid before Parliament.³⁹ A number of provinces have similar commissions.⁴⁰

There is, however, no necessity for the federal government to implement the recommendations, or even introduce legislation related to the recommendations—a source of considerable frustration, because some of the favourable recommendations of earlier commissions have not been acted upon. Nothing yet has been done with the Crawford Commission, which reported in 1993, and it is almost time to set up another commission. A new commission should, by statute, be created within six months of April 1, 1995.⁴¹

Chief Justice Lamer recently stated at the 1994 annual meeting of the Canadian Bar Association that perhaps other models should be studied. The Triennial Commission, he said, “looks good on paper, but it has one problem: it just does not work. Why? Because the Executive and Parliament have never given it a fair chance...While I favour giving it a chance...maybe...there are some other models that could be studied, and

indeed this is an area where the Bar could be of great help.”⁴² At the same C.B.A. meeting, the minister of justice, Allan Rock, took the same approach, stating: “obviously, the Triennial Commission process can be improved and we are open to suggestions and constructive ideas as to how to achieve that.”⁴³

Many, if not most, judges would like some form of binding mechanism to determine compensation. As a second best alternative, they would like a system similar to that in some parts of Australia, whereby the recommendations of the commission become binding unless rejected by the legislature.⁴⁴ There is no constitutional compulsion in Canada for any form of binding or negative resolution scheme. Section 100 of the Constitution Act simply provides that the salaries “shall be fixed and provided by the Parliament of Canada.”⁴⁵ The provinces are not even required constitutionally to establish salaries by legislation. *Valente*⁴⁶ held that salaries for provincially appointed judges could be set by order-in-council. Not only was it not constitutionally necessary to have the salary set by the legislature, but, according to Le Dain J., “it is far from clear that having to bring proposed increases to judges’ salaries before the Legislature is more desirable from the point of view of judicial independence, and indeed adequate salaries, than having the question determined by the executive alone, pursuant to a general legislative authority.”⁴⁷

Nevertheless, the more one can avoid head-to-head bargaining between the government and the judiciary, the better. Some buffer mechanism helps prevent the danger of subtle accommodations being made, involving, for example, increased pay or pensions for not blocking important government initiatives. In *Valente*,⁴⁸ there was in fact a buffer commission in existence in Ontario. It is possible, but unlikely, that the Supreme Court of Canada would hold that the absence of any form of commission, as still occurs in at least one province,⁴⁹ would be a violation of section 11(d) of the Charter.

A number of provinces have tried, usually informally, to establish ways of pegging salaries to external standards. At one time, the Alberta provincial court judges were said to be linked to 80% of what a federally appointed district court judge received,⁵⁰ but this link was later abandoned by the government. New Brunswick informally links provincial court compensation to that of the highest level of deputy minister.⁵¹ Newfoundland links the pay to the salary of the Deputy Minister of Justice.⁵² Prince Edward Island had linked the salary to the average of those of all the other provincial benches,⁵³ but recently changed it to match the average of the other Atlantic provinces’ provincial benches.⁵⁴ The federal government’s latest Triennial Commission, as we have seen, links salaries to the mid-range of the DM-3 category.⁵⁵

One important technique of cutting down on yearly confrontations is to provide for yearly adjustments to salaries to take into account changes in the cost of living. Section 25 of the Judges Act, which was introduced in 1981,⁵⁶ provides for a yearly adjustment of up to a 7% increase according to the change in the Industrial Composite (now the Industrial Aggregate) Index.⁵⁷ In theory, the salaries can go down as well as up. Subsequent Parliamentary approval is not required for the adjustment. The government, it seems, thought that this technique would solve the constant salary

confrontations. The Bill, stated Jean Chrétien, then minister of justice, on second reading, “makes provision for future remuneration which should avoid further difficulties flowing from the dependence of the judges on salary adjustments by statute...”⁵⁸ Royce Frith stated in the Senate that “the adjustment mechanism is certainly one of the most important elements that I have seen in the administration of judicial affairs ... the concept of which is intended to enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process.”⁵⁹ The Triennial Commission was added almost as a safety valve on the issue of pay. After discussing the indexation feature, the Minister of Justice stated: “In addition to salary indexation starting at an adequate level, the bill provides for the appointment of a commission made up of no more than five members [who] will be asked to examine every three years the adequacy of judicial compensation.”⁶⁰

C. Reducing Compensation

One of the issues currently subject to litigation in a number of provinces as this is being written is whether constitutionally there can be a roll-back of judicial salaries as part of a general government budget reduction endeavour. Some provinces specifically provide by statute that such reductions cannot be made,⁶¹ but, of course, statutes can be amended. The issue has come up in, at least, Alberta, Manitoba, Prince Edward Island, and Saskatchewan. In some provinces,⁶² it has arisen in the course of a criminal case when defence counsel challenges the independence of the judge under section 11(d) of the Charter. In some of these and in other provinces,⁶³ the issue has been in the form of a direct civil proceeding by the provincial court judges. In Manitoba, for example, the provincial court judges challenged what were described as “Filmon Fridays”, named after the premier whose government ordered that persons paid by the government take unpaid Friday holidays over the summer months. In November, 1994, Scollin J. held that the province could not constitutionally reduce judicial compensation. It could do so only as part of an economic measure applicable to *all* Manitoba citizens. Nevertheless, he held, the province could *defer* payments while the statute was in force.⁶⁴ As we will see below, this decision was overturned by the Manitoba Court of Appeal in late April, 1995.⁶⁵

The Manitoba trial court decision followed the reasoning of David McDonald J. of Alberta earlier that same month, arising out of a series of cases in which the independence of provincial court judges was challenged in the course of criminal cases.⁶⁶ (An action by the Alberta Provincial Judges Association and named judges has not yet come to trial.)⁶⁷ Mr. Justice McDonald, in a lengthy judgment held that a judge whose salary was reduced by 5% (along with salaries of other persons paid by the provincial government) was not independent within the meaning of the Charter: “an informed person”, he stated, “would reasonably perceive a reduction in salary to be an infringement of the guarantee of judicial independence.”⁶⁸ A recent commentator, however, takes the opposite position, stating that “if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying.”⁶⁹ The appearance, he stated, would therefore be worse than if there had been a reduction:

‘‘The judges’ exemption could be thought to be the result of secret deals, or secret commitments to favour the government.’’⁷⁰

‘‘The effect of s.11(d) of the Charter’’, McDonald J. concluded, ‘‘is that there may be only a general reduction by a mechanism (like income tax), the burden of which is shared by the population at large...and the salary scale must be adjusted upward from time to time to maintain the real value of the salaries.’’⁷¹ He struck down the salary reduction and held that the judges were therefore still independent. The government of Alberta has appealed the decision.⁷²

A similar case in Prince Edward Island has now reached the Court of Appeal.⁷³ Salaries of provincial court judges, along with those of many others paid from the public purse, were reduced by 7.5%. A provincial court judge declared himself not independent in a challenge to his independence brought by a number of defence counsel. This was upheld by the Chief Justice of the Trial Division, not on the basis that salaries of judges paid by the province could not be reduced, but because the Act allowed judges of the provincial court to negotiate with government the manner in which the reduction would be implemented.⁷⁴ This aspect of the scheme was then changed and a reference was made to the P.E.I. Court of Appeal. The Court of Appeal held that the scheme was valid.⁷⁵ The Province has, the Court said:⁷⁶

...a limited constitutional authority to alter the salary and benefits of the judges of the Provincial Court and could reduce them as part of an overall public economic measure so long as in so doing: (1) it does not remove the basic degree of financial security which is an essential condition for their independence within the meaning of s-s. 11(d) of the Charter; and (2) there is no indication that the legislation amounts to arbitrary interference with the judiciary in the sense that it is being enacted for an improper or colourable purpose, or that it discriminates against judges vis-à-vis other citizens.

A reasonable person, they held, would not ‘‘conclude that the independence of the Provincial Court judges has been compromised.’’⁷⁷

The P.E.I. provincial court judge who had originally held that he lacked independence did not give up, stating metaphorically at the beginning of a subsequent case that ‘‘World War I was supposed to be the war to end all wars.’’⁷⁸ He again accepted the validity of a challenge to his independence, claiming that the Court of Appeal on the reference did not have all the relevant background facts and that counsel for the accused should not have conceded a number of matters such as that the reduction was a ‘‘coherent part of an overall public economic measure designed to meet a legitimate governmental objective.’’⁷⁹ He therefore held that ‘‘a reasonable and fair-minded person...could conclude by a balance of probabilities that the independence of the Provincial Court has been seriously compromised especially if it looks at the fact that over a period of some six years the Government or Legislature has *five times* altered or attempted to alter downward the salaries of the Provincial Court.’’⁸⁰ At the time this is being written, a further reference is being made to the P.E.I. Court of Appeal.⁸¹

The Manitoba Court of Appeal in a unanimous five-person judgment very recently allowed the government's appeal from Scollin J.'s judgment. The Court went back to the *Valente* test, asking, "Would a reasonable and informed person perceive the Provincial Court judges as enjoying the essential conditions of independence required for purposes of section 11(d) of the *Charter*?"⁸² To the Manitoba Court of Appeal, it is not essential that the reduction be part of "general overall economic measure." The Court stated:⁸³

The fact that a reduction in judicial salaries is part of such a measure would go a long way in satisfying the informed and reasonable person that the measure was not enacted for an improper or colourable purpose. But one cannot jump to the conclusion that a salary reduction that is not a part of such a measure was enacted for an improper or colourable purpose. The circumstances of each case must be examined. In each case, the informed and reasonable person would have to answer the question as to whether or not the measure amounted to a discretionary or arbitrary interference in a manner that would affect judicial independence.

The English experience in the 1930s is complicated, and it is not entirely clear who won.⁸⁴ As a result of the financial crisis in the Depression, the government passed an Act in 1931 to reduce by 20% the salaries of all "persons in His Majesty's Service", including the judges.⁸⁵ The judges objected on a number of grounds, including a statutory construction argument that the Act did not cover them.⁸⁶ But their main concern was that they were being treated as civil servants. A memorandum sent by the judges to the Prime Minister stated: "It is, we think, beyond question that the judges are not in the position occupied by civil servants."⁸⁷ And the Lord Chancellor, Viscount Sankey, wrote privately to a member of the House of Lords: "What they all feel most is being classed with other people...The thing that every one of them cares about most is, as they put it, that they were herded together with Civil Servants, teachers, policemen, and so forth."⁸⁸ There was also the very real concern felt by many judges that judicial salaries were very low, as they undoubtedly were, not having been raised for over 100 years. After several years of controversy, the reduction was withdrawn.⁸⁹

In Canada, the Bennett government in 1932 proposed a 10% reduction for civil service salaries, but they specifically exempted the judges. This caused a furor in the House of Commons, as members argued that judges should be made to bear some of the nation's hardship.⁹⁰ Prime Minister Bennett referred to some of the arguments against a decrease made in England the previous year and said: "There are, however, other methods by which the matter may be dealt with."⁹¹ Several months later, the government imposed by legislation a 10% tax on judges for one year under the Income War Tax Bill.⁹²

Most academic commentators agree that salaries can be reduced as part of an overall reduction for persons paid with public funds.⁹³ Whether it is wise to do so is another matter as it inevitably will lead to a conflict between the judiciary and the executive,

which cannot be good for the concept of judicial independence. Ontario wisely consulted with the provincial court judges, who voluntarily agreed to a form of reduction.⁹⁴ William Lederman examined the history of the reduction of judicial salaries in England in the early 1930s⁹⁵ and concluded that "Parliament has power to adjust the level of judicial salaries."⁹⁶ To Lederman, the English reduction "was non-discriminatory in the sense that all salaried public offices of whatever nature were affected on the same terms, and those relying on private income were also suffering, under the impact of the economic depression."⁹⁷ Peter Hogg has no doubt that such a reduction does not violate judicial independence. "The argument that such a non-discriminatory reduction would threaten judicial independence", he wrote, "seems fantastic, but it was seriously advanced by constitutional lawyers, judges, government ministers and members of parliament."⁹⁸ Lederman would, however, impose two limitations: "it is unconstitutional in Britain," he wrote, "to cut the salary of an individual judge of a superior court during the currency of his commission" and, he went on, "it would seem to be unconstitutional also for Parliament to attempt a general reduction of the judicial salary scale to an extent that threatens the independence of the judiciary."⁹⁹ This is basically the position adopted by the P.E.I. Court of Appeal¹⁰⁰ and one that this writer finds attractive.

The federal government did not roll back wages in the recent recession. Instead, it prevented the previously discussed automatic cost-of-living pay increases that are set out in the Judges Act.¹⁰¹ It was announced in 1992 that judges, like others paid out of government funds, would have a pay freeze for the years 1993 and 1994.¹⁰² This was subsequently extended for another two years to 1997.¹⁰³ Chief Justice Lamer protested that the judges should have been consulted before the freeze was ordered.¹⁰⁴ The judges threatened through their counsel then appearing before the Crawford Triennial Commission, that they were considering legal action,¹⁰⁵ but the threat was not acted upon, in part, it seems, because it was disapproved of by a number of chief justices. McDonald J.'s decision in Alberta, it will be recalled, holds that constitutionally "the salary scale must be adjusted upward from time to time to maintain the real value of the salaries."¹⁰⁶ There is little to support this on a constitutional basis. Even in the U.S., where, in the case of federal judges, salaries cannot constitutionally be reduced ("which shall not be diminished during their Continuance in Office"¹⁰⁷), there is no necessity to increase salaries to keep up with inflation.¹⁰⁸ Moreover, as previously mentioned, English High Court judges did not get increases for over a hundred years.

We will have to wait and see how these actions will turn out. In my opinion, if a case reaches the Supreme Court, the Court's decision will probably turn on whether the roll back was part of a general government scheme for controlling costs. If it was part of an overall scheme, then it is likely that the government action will be upheld. The 1983 Montreal Declaration on the independence of the judiciary permits such reductions "as a coherent part of an overall public economic measure."¹⁰⁹ This part of the Declaration, it should be noted, was quoted by Chief Justice Dickson in *Beauregard*, the pension deduction case, where he made the point that judges had to bear their fair share of the cost of running the country.¹¹⁰ The Court is unlikely to accept the

proposal that reductions are acceptable only if applied to all citizens through a mechanism such as the income tax. In a recession, other citizens suffer as well. No doubt the Supreme Court would decide differently if the roll back was directed specifically or mainly at judges. Counsel will probably try to show in each case that the judges are being improperly singled out in some way or, as in Saskatchewan, which will be discussed in the next subsection, that the government acted in breach of contract.

D. Binding Arbitration and Other Techniques

Although Ontario was the first province to adopt the principle of binding arbitration,¹¹¹ Saskatchewan was the first province actually to use the technique.¹¹² In February, 1993, the Saskatchewan government and the Provincial Court Judges Association entered into an agreement that provided for binding arbitration every three years.¹¹³ Each side would pick a member of the tribunal, who would then choose the chair. Failing agreement, the chair would be chosen by the Dean of Law. The resulting recommendations were to be implemented by amending the regulations within 90 days of their receipt.¹¹⁴ The agreement was given effect by being incorporated into an amendment to the Provincial Court Act.¹¹⁵ Later in 1993, the commission appointed earlier that year unanimously recommended a 20% increase in provincial court salaries over a three year period.¹¹⁶ The commission was struck by the wide discrepancy between provincial and superior court salaries, the former at \$90,000 a year being only 58% of the latter.¹¹⁷ The government, however, rejected the award and repealed the provisions establishing the commission.¹¹⁸ As mentioned above, the Provincial Court Judges Association has brought a lawsuit alleging that the government's action is a breach of contract and a violation of the judges' independence.¹¹⁹

Ontario's binding arbitration procedure will not come into operation until July 1, 1995.¹²⁰ The Ontario agreement, like the Saskatchewan agreement, was incorporated into legislation, in Ontario's case into the recently enacted Courts of Justice Statute Law Amendment Act.¹²¹ Section 2 of the agreement outlines its purpose:

The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining the independence of the Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

Recommendations with respect to salaries are to be implemented by the Cabinet by order-in-council within 60 days of receipt of the report.¹²² Recommendations relating to non-salary matters would not be binding, but would "be given every consideration

by Management Board of Cabinet.”¹²³ A number of non-binding criteria are established in the agreement, including the following:¹²⁴

- (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,
- (c) the growth or decline in real per capita income...
- (e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence.

Binding arbitration is not likely to appeal to the federal government. Indeed, the history of it in Canada thus far, judging by the situation in Saskatchewan, is not good. Governments understandably do not want to turn over to a third person the financial responsibility of government. Nor should they. The Crawford Commission also took this approach, stating that it was neither “desirable” nor “constitutional” for the Triennial Commission recommendations to be binding on the government.¹²⁵ Another approach is to adopt the negative resolution scheme now used in Australia for the New South Wales judiciary and for the Australian federal judiciary.¹²⁶ The recommendation would be binding unless rejected by Parliament. Such a scheme was recently adopted in British Columbia, where the report of a triennial committee (the Judicial Compensation Committee) is to be tabled in the legislature within 14 days of its receipt by the Attorney General and is binding unless rejected or amended by the Legislative Assembly.¹²⁷ The legislation states:¹²⁸

- (9) The Legislative Assembly may, by a resolution passed within 21 sitting days after the date on which the report and recommendations are laid before the Legislative Assembly under subsection (8),
 - (a) resolve to reject one or more of the recommendations made in the report as being unfair or unreasonable, and
 - (b) fix the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.
- (10) If a recommendation is not rejected by the Legislative Assembly within the time limited by subsection (9), the judges are entitled to receive the remuneration, allowances and benefits proposed by that recommendation beginning on January 1 of the year in respect of which the recommendation was made.

A Model Judicial Compensation Statute was recently developed by a committee of the American Judicature Society which provides that the commission’s biennial report is to be “binding and have full force of law immediately upon the 90th day following the lodging of the biennial report with the clerk of the legislature, provided that neither a majority [of either House] votes to reject any or all such recommendations.”¹²⁹

There is a wide variation in techniques in the American states.¹³⁰ Perhaps none is more unique than that found in the State of Washington, where there is a 15-member commission, eight of whose members are chosen completely randomly from the eight congressional districts. The scheme was the result of a constitutional amendment in 1986 to establish the salaries of statewide elected officials, including judges. The Salary Commission's conclusions become law¹³¹ unless a voters' referendum defeats them. Judicial salaries have apparently increased by almost two-thirds in the six years from 1987 to 1992. A Washington Supreme Court judge was paid \$66,000 on January 1, 1987, and \$107,200 on September 1, 1992.¹³²

The Lang Triennial Report in 1983 said that a negative-resolution scheme in Canada would be unconstitutional.¹³³ Salaries, according to section 100 of the Constitution Act, have to be fixed by Parliament.¹³⁴ Professor Peter Hogg in a 1989 opinion took the same position, stating that "the inaction by Parliament is insufficient participation in the process to enable one to say that the salaries have been fixed by the Parliament. It seems more natural to say that the salaries have been fixed by the tribunal, and left undisturbed by the Parliament." "In my opinion," Hogg concluded, "the negative resolution procedure does not satisfy the requirement of s.100 that judicial salaries be fixed and provided by the Parliament of Canada."¹³⁵ The Lang Commission suggested a constitutional amendment. Is a constitutional amendment really necessary? Could not Parliament enact a law providing, for example, that inaction is deemed to be an affirmative vote? Note that, as previously observed, yearly increases are covered by general legislation, not by specific affirmative votes each year.¹³⁶ Perhaps a more serious objection to the proposal is section 54 of the Constitution Act, 1867, which provides that a money vote must first be "recommended" by the government.¹³⁷ I would speculate that the Supreme Court of Canada would probably uphold legislation that provided that the government had to introduce a resolution responding in some manner to the Triennial Commission report and that failure of Parliament to negative the resolution would be deemed to be an affirmative vote. However, I leave the constitutionality of the negative resolution procedure to the constitutional experts.

Professor Peter Russell is not happy with the negative resolution procedure, arguing that the "procedure" would further undermine parliamentary government in Canada.¹³⁸ He would prefer an affirmative resolution requiring a positive vote of Parliament before the Commission's proposals become law, as has been done since 1965 in England with orders-in-council increasing the salaries of the higher judiciary.¹³⁹ The Crawford Triennial Commission sensibly recommended that there be a statutory obligation on the government to "state its response to the recommendations of a Triennial Commission, and introduce its resultant legislation, as soon as feasible but in any event within 20 sitting days after the expiry of a nine-month period immediately following the submission of the Triennial Commission's report to the Minister of Justice."¹⁴⁰ This is similar to the positive vote procedure preferred by Russell. Either the positive or the negative resolution system would, in my view, be preferable to the existing system. Perhaps in the long run they would prove to be more long-lasting and therefore better for judicial independence than binding

arbitration, which, as in Saskatchewan, may end up being scrapped if the award is higher than the government is prepared to tolerate.

E. Setting Salaries in Other Common-Law Jurisdictions

There is another lesson we can learn from studying techniques for establishing compensation in other jurisdictions. It is this: when we compare Canada with England, the United States, and Australia, the three common-law systems we usually look to for comparison, we see that Canada is the *only* country that sets senior judicial salaries separately from other senior salaries. The other three jurisdictions have techniques for establishing senior judicial salaries in conjunction with legislative and executive salaries.

The U.S. Federal Commission on Executive, Legislative and Judicial Salaries is constituted every four years.¹⁴¹ The Commission, first set up by the Federal Salary Act of 1967,¹⁴² is composed of nine members. Three are chosen by the President, two by the President of the Senate, two by the Speaker of the House, and two by the Chief Justice of the United States. The Commission holds public hearings and reports to the President, who then brings recommendations to Congress. As a result of inaction by Congress in the past, an amendment was passed in 1989 that provides that the President's proposals to Congress (which are not necessarily the Commission's) are deemed to be approved unless rejected within 60 days¹⁴³—that is, the negative resolution technique.

One advantage of the American system is that the commission can be at the beginning of a President's mandate and thus is not as closely tied up with politics and re-election as it would be at the end of a mandate. The Canadian Triennial Commissions are set up every three years, and it is accidental when one comes during a government's mandate. In Canada, senior civil service salaries are set separately towards the beginning of a new term of Parliament,¹⁴⁴ and therefore increases do not create the same political problems as if they were later in the mandate. Another advantage in having judicial salaries examined along with others is that judges are not pleading for more remuneration in isolation, with all the negative impressions this personal, seemingly selfish, plea brings about. Moreover, if the Commission's recommendations are rejected by Congress, it is not a direct slap in the face of the judges, as it is often seen to be in Canada. There is a strong element of masochism in the present Canadian system.

England also sets salaries of judges along with those of others.¹⁴⁵ The groups whose salaries are reviewed consist of judges, senior civil servants, senior members of the armed forces, members of Parliament, and cabinet ministers.¹⁴⁶ The Review Body consists of nine distinguished persons—referred to as “the great and the good” by a number of persons in England with whom I talked. There are at present two lawyers on the committee, a barrister who was formerly the Parliamentary Ombudsman, who chairs the judicial subcommittee, and a solicitor, who is the other member of the subcommittee. The Review Body deals only with salaries and not pensions and other

benefits.¹⁴⁷ Again, rejection of the Review Body's recommendations is not as insulting to the judges as if they alone were rejected.

Such a scheme would allow a commission to examine judicial salaries in relation to proposed deputy minister and cabinet salaries, the two groups that should be the closest parallels to judicial salaries. (In 1875, when the Supreme Court of Canada was established, its judges were paid the same as cabinet ministers.)¹⁴⁸ Some link with salaries of very senior civil servants is clear in Canada,¹⁴⁹ the United States, and England.¹⁵⁰ The real issue is what level of civil service should be used as a comparison. Should it be all deputy ministers? Or should it be the very top deputy ministers, that is, those in Canada at or above the mid-range of the DM-3 category, at present consisting of 14 deputy ministers?

Australia, it should be added, has a similar technique for setting salaries for federal judges along with others, and includes, as previously mentioned, a negative resolution procedure.¹⁵¹

I suggest that these models be considered as a possible substitute for the present Triennial Commission. A similar approach at the provincial level could be used for setting salaries for provincial court judges. Coupled with this should be some form of positive or negative resolution procedure in relation to salaries to ensure that the recommendations proposed by the commission, or preferably, as in the U.S., by the government in response to the commission's proposals, are actually considered by Parliament.

2. PENSIONS

Pensions are a crucial part of judicial security. If a judge's pension is inadequate or insecure, there is a danger that the judge will not be fully independent while sitting on the bench. Section 100 of the Constitution states that salaries, allowances, and pensions "shall be fixed and provided by the Parliament of Canada."¹ If the pension is not adequate and secure, the judge may be inclined to favour a side that may be important in the judge's future, in particular, the government that may be looked to for a pension. Worse, the judge may be tempted to accept favours or bribes from litigants while on the bench. Prime Minister Sir Wilfrid Laurier brought in legislation in 1903 providing for pensions at full salary² (later reduced to two-thirds of salary),³ stating that the object was "to put judges above temptation, to ensure their dignity and independence, and to make them what they should be, the impartial arbiters of all differences in the community."⁴ So it is in society's interest to ensure that pension arrangements are good ones. It is better, in my view, to err on the side of being generous than of not being generous enough—for the sake of society, not for the sake of the judges.

A good pension is also one of the major inducements to accept an offer of a judgeship. The pension is considerable. A person would have to have about \$1,400,000 dollars at

age 65 to purchase an indexed annuity with survivor benefits equal to a federal judge's pension, at present paying a little over \$100,000 a year—i.e., two-thirds of the judge's final salary. But, of course, the judge would have contributed 7% of his or her salary towards the pension for the past 15 years (assuming the judge was appointed at age 50 and retired at 65), and the accumulated value of this, which amounts to about \$300,000, would have to be deducted. The net sum would still be well over a million dollars.⁵ Of course, the longer the person remained a judge, either because appointed at an early age, as many women are, or becoming a supernumerary judge after age 65, as the vast majority of judges do, the less valuable the pension entitlement would be. Pensions for U.S. federal judges are even more generous. A judge can retire *at full salary* for life at age 65 after 15 years on the bench.⁶ Pensions for Canadian provincial court judges vary from province to province. As we will see later, some are very generous, others are decidedly and dangerously ungenerous.

The present pension arrangements for federally appointed judges is set out in sections 42 to 53 of the Judges Act.⁷ Section 42(1)(a) is the basic provision, providing for a pension to “a judge who has continued in judicial office for at least fifteen years, has attained the age of sixty-five years and resigns his office.”⁸ The pension—or as it is called in the Act, the annuity—is “equal to two-thirds of the salary annexed to the office held by the judge at the time of his resignation.”⁹ (Like the Crawford Commission,¹⁰ I do not draw a distinction between the terms pension and annuity.) Prior to 1971, judges had to have worked 15 years and be 70 years of age in order to qualify for a pension.¹¹ The retirement age was lowered to 65 (after 15 years) at the same time as supernumerary status was brought in.¹²

The history of pension arrangements in Canada is very complicated. At times, there were different arrangements for judges in different provinces and for judges of different courts within the same province. The first federal statute dealing with the matter was in 1868.¹³ It provided for a pension of 2/3rds of the judge's salary for superior court judges after 15 years' service.¹⁴ The section said, however, that the government “may” grant the annuity.¹⁵ It was meant to be discretionary and appears to have been designed to get rid of a number of problem judges, particularly in Quebec.¹⁶ County court judges, on the other hand, had to serve 25 years before they could receive a pension of 2/3rds of their salary.¹⁷

These arrangements continued¹⁸ until 1903, when an additional section was added to encourage very old judges to retire.¹⁹ It provided that a pension *at full salary* “may” be given to any judge who was age 75 and had 20 years of service or age 70 and had 25 years of service, or any age and had 30 years of service.²⁰ The earlier arrangement of 2/3rds of salary after 15 years' service for superior court judges or 25 years' service for county court judges continued. There appears to have been controversy over whether the arrangement was mandatory or discretionary. The section said that the government “may” grant a pension.²¹ In 1919, legislation was passed making it clear that it was to be discretionary for all future appointments: “No annuity shall be granted to any judge under [the 2/3rds and 15- or 25-year rule] unless the Governor General in Council is of opinion that it is in the public interest that such judge should resign

his office.”²² Some objected to the provision as leaving too much discretion to the Cabinet. “It leaves the matter too much open to political influence,”²³ one member argued, but the section was passed. In 1920, the full salary pension was eliminated for all future appointments and any salary increases were not counted towards a pension for existing judges.²⁴

So the basic pension arrangement until 1960²⁵ was, for superior court judges, a discretionary pension (“in the public interest”), consisting of 2/3rds of salary after 15 years’ service with no minimum age requirement.²⁶ It would not normally be “in the public interest” for younger, healthy judges to be granted a pension. For county court judges, 2/3rds of salary was payable as a pension after 25 years of service.²⁷ Supreme Court of Canada and Exchequer Court judges would get 2/3rds of their salary at age 75 after 10 years of service.²⁸ One change that was made in the redraft of the Judges Act in 1946²⁹ was to change the wording from “an annuity equal to two-thirds of the salary”³⁰ to “an annuity not exceeding two-thirds of the salary.”³¹ This indicated that a certain degree of behind-the-scenes bargaining was and would continue to take place. The 1946 Act for the first time made provision for spousal allowances (“may grant to the wife of a judge” was at the time the only possibility contemplated by the legislation!)³² of an annuity not exceeding one-half of the annuity granted to the judge.³³

Then in 1960, all federally appointed judges were placed on an equal footing with respect to pension arrangements. The section read as follows:³⁴

23. (1) The Governor in Council may grant to

- (a) a judge who has continued in judicial office for at least fifteen years and has attained the age of seventy years, if he resigns his office,
- (b) a judge who has continued in judicial office for at least fifteen years, if he resigns his office and in the opinion of the Governor in Council the resignation is conducive to the better administration of justice or is in the national interest,
- (c) a judge who has become afflicted with some permanent infirmity disabling him from the due execution of his office, if he resigns his office or by reason of such infirmity is removed from office, or
- (d) a judge who ceases to hold office by reason of his having attained the age of seventy-five years, if he has held judicial office for at least ten years or if he held judicial office on the day this section came into force,

an annuity not exceeding two-thirds of the salary annexed to the office held by him at the time of his resignation, removal or ceasing to hold office, as the case may be.

In the 1971 amendments, which introduced supernumerary status, the minimum age for receiving a pension after 15 years of service was reduced from 70 to 65.³⁵ Further changes made in 1981³⁶ were to change back to the words “equal to two-thirds of the

salary” from the words “not exceeding two-thirds of the salary” and to add a provision that a person serving less than 10 years before retirement would receive a pro-rated pension.³⁷

The present legislation states that the Cabinet “shall grant” a pension.³⁸ Before 1981, as we have seen, the legislation had said “may”,³⁹ and the government treated some pension matters, particularly on grounds of disability, as discretionary. A Federal Court trial judge, however, in proceedings involving Leo Landreville, held that the word “may” meant “shall”.⁴⁰ Collier J. stated: “‘may’ must be read as ‘shall’. Otherwise, the accepted theory of the independence of the judiciary is transgressed; the intention and effect of the applicable provisions of the *British North America Act, 1867* is eroded if not contradicted.”⁴¹ The Judges Act was amended in 1981⁴² to substitute “shall” for “may” and, as stated above, the pension was fixed at 2/3rds, not “up to” 2/3rds.

Other provisions provide for a similar two-thirds pension if the judge reaches age 75 and has 10 years of service⁴³ or if less than 10 years’ service, then a prorated pension.⁴⁴ There is another provision (s. 42(1)(b)) which provides for a pension when the judge has served less than 15 years and resigns “if in the opinion of the [Cabinet] the resignation is conducive to the better administration of justice or is in the national interest.”⁴⁵ This clearly continues some aspects of the discretionary treatment of pensions. Pensions are also provided for cases of “permanent infirmity”,⁴⁶ a topic which was discussed in the previous chapter.

Judges would, understandably, like the age at which they are eligible to receive a full pension to be lower than age 65.⁴⁷ A compelling case can be made for a somewhat earlier retirement age for those appointed at a very young age, as many women have been in the recent past. The average age for appointment of women to the federal bench over the past ten years is the early forties, whereas for men it is the early fifties.⁴⁸ At present, a person appointed at, say, 35, must work 30 years before being eligible for a pension. This seems unfair when compared to the situation of a person who gets the very same pension at age 65 after only 15 years of work as a judge, or a person at age 75 who has worked only 10 years. There should be some relationship—even if inexact—between the length of time worked and the eligibility for a pension.

Canadian judges have asked for what is called “the rule of 80”.⁴⁹ This would provide that a person could retire at age 60 or over if the number of years of service plus the age of the judge adds up to 80. The Crawford Triennial Commission, which reported in 1993, agreed, and recommended that “retirement at full pension be permitted when a judge has reached at least 60 years of age and has served on the bench for a minimum of 15 years, provided the sum of age and years of service equals at least 80.”⁵⁰ It is assumed by some judges that this is similar to the American “rule of 80”, but in fact it is not. The U.S. federal “rule of 80” applies only *after* the age of 65.⁵¹ It allows retirement with a full pension if the judge is 65 and has served 15 years or 66 and has served 14 years and so on up to age 70 and 10 years.⁵² Canada should consider adopting this version of the rule of 80, at least for the purpose of

permitting the judge to elect supernumerary status. A judge can now elect supernumerary status at age 65 after 15 years and at age 70 after 10 years, but nothing in between. Why not, for example, permit a judge at age 67 to become a supernumerary judge after 13 years on the bench and permit the judge to retire at age 69, having served the presently required 15 years?

The proposed Canadian “rule of 80” at age 60 seems to me too generous in certain cases. For example, why should a person appointed at age 44 be able to receive a pension of over \$100,000 a year for life from age 62? Twenty years’ work may well justify a full pension at 60. But why does it follow that 18 years’ work justifies a full pension at 62?

Neither the U.S. federal judges nor the English superior court judges have the right to retire on full pension before the age of 65. If early retirement provisions are too generous, it will encourage some with other career opportunities to take early retirement. These judges are often amongst the best judges. Moreover, we should not encourage judges to think of a judicial career as a stepping-stone to another career. As the judges themselves argued before the Crawford Commission: “accepting an appointment to the Bench is not a ‘middle of career’ commitment but rather a Judge’s last career.”⁵³

If a judge were permitted to retire with a full pension too early, many capable and energetic judges would understandably look for a third career. This could decrease the perceived independence of the judiciary in the eyes of the public. Is the judge using his or her judicial career as a springboard to a political, business, or other career? Is the judge tailoring decisions to enhance his or her future? These questions are not now asked because retirement is at age 65, the normal retirement age in society, when there are generally far fewer options open than at, say, age 60. Of course, a person can start a third career now at age 65, but few do it. Superior court judges almost invariably stay on as supernumerary judges after age 65. Those who retire tend to get involved in alternative dispute resolution hearings. This is as it should be, in my view. We should be cautious about changing the system to make it too easy for judges to leave the bench at too early an age.

Still, there are two problems that have to be dealt with: the judge who has been on the bench for a *very* long period of time and is subject to serious burnout; and the judge who thoroughly dislikes being a judge, but is trapped by the “golden handcuffs”⁵⁴ of the eventual pension.

The issue of the very-long-serving judge could be solved by allowing that judge to retire at full pension at any age. Who should be considered a long-serving judge? Twenty-five years should surely qualify. Twenty may not be long enough. But why do we always look at judicial retirement in figures that can be divided by five? Maybe 22 years is the right period for retirement at full pension *before* age 65. (The right to retire at age 65 after 15 years would still be available.) If we took 22 years as the appropriate period, then a person appointed at age 38 could retire at 60 on full pension,

a person appointed at 39 could retire at 61, and so on, allowing a person appointed at 42 to retire at 64. Supernumerary status should also be available at these ages, rather than full retirement. Burnout can, in part, be reduced by providing judicial sabbaticals or study leave fellowships in appropriate cases, as is now being done for federally appointed judges.⁵⁵

How about the person who is unhappy as a judge, wants to leave, but does not have the required period of long service? The solution here is to permit a measure of early retirement with an actuarially reduced pension. England has recently passed legislation permitting an actuarially reduced pension if a person with at least five years of service wishes to retire between the ages of 60 and 65.⁵⁶ This seems to me to be sensible. Provincial statutes relating to the provincial court increasingly permit early retirement.⁵⁷ Ontario, for example, recently brought in regulations permitting such retirement.⁵⁸ Universities and industry invariably permit some form of early retirement.

Of course, a person is free to resign from the bench at any time. In such a case, the judge will receive back his or her contribution with interest,⁵⁹ but this is a relatively small sum. The sum is small because, as the Crawford Commission points out, the total contribution that a judge makes to his or her pension, although 7% of salary, is only about one-fifth of the overall cost of the pension. About 80% of the cost is borne by the taxpayers.⁶⁰ Should we permit retirement at any time on an actuarially reduced basis? The U.S. National Commission on Judicial Discipline and Removal considered this option,⁶¹ and were closely divided on its wisdom: "Partial vesting might encourage some federal judges with conduct or disability problems to resign. Against that possible benefit, however, is the possible cost of encouraging perfectly fit federal judges to leave the bench for other pursuits."⁶² The National Commission did not want to adopt any scheme to permit a healthy judge to retire with a pension before age 65.⁶³ The English solution, however, permitting early retirement on an actuarially reduced basis after the age of 60 (perhaps based on a 20-year accrual period)⁶⁴ seems to me to provide for the possibility of early retirement without actually encouraging it. Similarly, a retirement before age 60 should give judges back somewhat more than their own contribution plus a very low rate of interest (at present 4%). It should be at least at the going rate of interest (e.g., government bonds) for the relevant years. This would not provide an incentive to retire, but would assist judges who feel they made a mistake in accepting an appointment in leaving the bench.

The above options should, of course, also be available to Supreme Court of Canada judges. I agree with the Crawford Commission that because of the "unusually heavy burden inherent in membership on the Supreme Court of Canada"⁶⁵, judges of that court should in addition have the option of retiring after serving a minimum of 10 years on the Court and reaching the age of 65 years.⁶⁶ Further, I would permit a Supreme Court of Canada judge to retire at any age after 15 years of service on the Supreme Court. One does not want a judge of this important court who wants to leave to be trapped into staying after a reasonable period of service.

This is not the place to discuss in detail all the many aspects of pension benefits. One point that should be discussed, however, is the fact that judges are still seeking a non-contributory pension.⁶⁷ The Supreme Court of Canada, however, upheld the constitutionality of contributions in the *Beauregard* case in 1986,⁶⁸ and the recent Crawford Commission stated: "We are firmly of the view...that reasonable pension contributions do not affect judicial independence."⁶⁹ Similarly, the Crawford Commission took the reasonable view that judges should not be able to contribute more to an R.R.S.P. than any taxpayer is allowed to contribute. The Commission stated: "We cannot say it better than Chief Justice Dickson did in *Beauregard*: 'Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country.'"⁷⁰

There are wide variations in provincial pension plans. Some are very generous—indeed, perhaps too generous. For example, one province gives a full pension of two-thirds of salary at age 65 after only 10 years of service.⁷¹ Exactly the same pension is payable to a person who retires at age 65 with 30 years of service. Some provinces make it very difficult to achieve a reasonable pension. In one province,⁷² for example, the pension scheme is exactly the same as the civil service plan, that is, 2% of salary a year times the number of years of service. So a period of 20 years on the provincial court bench would result in a pension of only 40% of salary.

Surely the amount of the pension should be linked in some reasonable way to the length of time served. In provinces where it is linked, the multiplier varies widely. In one province, the number of years of service is multiplied by only 1.5%;⁷³ in another, it is as high as 3.3%.⁷⁴ What is a reasonable multiplier—or to put it another way, what is a reasonable period of service that will result in a full pension? If the pension is 2% of salary times the number of years, one would have to work 33 years to get two-thirds of one's salary on retirement. If the pension is 3.3% times the number of years, then a pension of two-thirds of one's salary is achieved in 20 years. The present federal pension of two-thirds of salary is the equivalent of 4.4% of salary multiplied by 15 years of service.

England has recently brought in legislation changing the accrual period required to obtain a full pension.⁷⁵ Instead of a fifteen-year period, twenty years is now required for future appointments before a full pension can be obtained.⁷⁶ As previously discussed, an actuarially reduced pension is now possible in England if one is age 60 or over and has at least five years of service on the bench.⁷⁷

A twenty-year accrual period is, in my view, reasonable for provincially appointed judges and should be considered for *future* federally appointed judges. Time served as a supernumerary judge should be included in the 20-year period, as contributions continue to be made towards the pension during that period. Perhaps contributions should cease in all cases after twenty years. Persons appointed at a younger age will have no difficulty in putting in the necessary twenty years. Those appointed at an older age will, of course, have some difficulty and would have to take an actuarially reduced pension. But a lawyer appointed at, say, 57 would normally have had about 30 years

in practice in which to build up tax-sheltered R.R.S.P.s.⁷⁸ If someone at that age has been sufficiently irresponsible not to have a reasonable amount of retirement savings, then one wonders whether the person has the responsibility and judgment required in a judge. Perhaps, as part of the appointment process, the person's financial security (including the eventual judicial pension) could be more carefully examined, just as now a candidate whose present finances are shaky and might lead to bankruptcy are considered by some selection committees.

As Lord Mackay, the Lord Chancellor, stated in the House of Lords in introducing the twenty-year accrual period, such a period would bring the pension somewhat closer to pensions in the private and public sectors.⁷⁹ A twenty-year period is still far more favourable—almost twice as favourable—as the present tax laws allow in Canada for other citizens where there is a \$60,000 limit on tax-sheltered pensions and where one has to work 35 years to achieve the \$60,000 limit.⁸⁰ Strict harmonization with the tax system for judges is not desirable, but it should not be too far out-of-line with other pension schemes. The new English legislation was criticized by some who felt that it would hinder recruiting from the bar.⁸¹ Whether this is so in England I am not in a position to say, but it is unlikely to have much impact in Canada. The somewhat longer accrual period would be a disadvantage in recruitment, but the right to have retirement at age 60 (although on an actuarially reduced basis) and the right to elect supernumerary status between the ages of 65 and 70, with somewhat less than 15 years' service, as suggested above, would be a distinct compensating advantage for most appointees.

3. CONCLUSION

In this section we tie together some of the points made in this and the previous chapter with respect to retirement, supernumerary status, pensions, and incapacity through disability. In addition, some general conclusions with respect to remuneration are set out. Security of tenure and financial security are, as described by Le Dain J. in *Valente*, two of the "essential conditions of judicial independence for purposes of s.11(d) of the Charter."¹

The previous chapter outlined some of the reasons why retirement at age 70 is desirable and should be implemented for future appointments by a constitutional amendment. Retirement at age 70 would bring Canada in line with most other countries. Until 1987, a large proportion of federally appointed judges in fact retired at age 70, and it was government policy—at least during the 1970s—to seek a constitutional amendment to provide that all future federal appointments would require retirement at age 70. In 1987, however, the government changed the law, allowing *all* federally appointed judges, existing and future, to remain until age 75. It was thought that the Charter required the change, but as it turned out, it probably did not—at least for county and district court judges. It would have been better to have reduced the retirement age of

future superior court appointments to 70, the age of county and district court retirements.

Retirement at age 70 would therefore permit supernumerary status for only five years. This is a more reasonable period than the present 10 years. Judges who retire at age 70 probably will have increasing opportunities to work in the emerging alternative dispute resolution field, but they will be willingly selected by the parties to the dispute. In the section on supernumerary status, it was suggested that the Canadian Judicial Council develop a uniform policy across the country on minimum workloads and similar issues for supernumerary judges.

At present, federally appointed judges may retire at age 65 after 15 years on the Bench. A number of adjustments are suggested in the above section on pensions. Long-serving judges, in my view, should be able to retire at any age with a full pension. What would constitute “long service” will be controversial. My own preference for retirement before age 65 would be somewhere between 20 and 25 years, possibly 22 years. Judges would continue to have the right to retire at age 65 or older after 15 years’ service. I would also permit, as England now does, early retirement at age 60 on an actuarially reduced pension. Further, because of the immense burdens on Supreme Court of Canada judges, there should be special retirement rules, permitting retirement at age 65 after only 10 years on the Supreme Court bench and at any age after 15 years on the bench. These would be exceptions to the rule that judges should normally not be eligible for retirement before age 65. In my view, it is not in society’s interest to encourage good judges to leave the bench for a possible third career after accepting a judgeship. Judicial independence is enhanced if a judgeship is not thought of as a “middle of career” commitment.

Pensions for provincial court judges vary widely from province to province. I suggest that a reasonable accrual period for a full pension at age 65 be 20 years. The federal government should also consider such an accrual period (including the period as a supernumerary judge) for future federally appointed judges.

In the previous chapter, suggestions were made on dealing with the issue of incapacity because of disability. At present, such issues are handled through the discipline process, incapacity through disability being treated as a lack of “good behaviour.”² It would be better, in my opinion, except in extreme cases, to treat these cases the same way as they are dealt with in other parts of society, that is, through long-term disability status. As in the U.S. federal system, the judiciary should be the ones to make the determination based on medical evidence. As in the U.S., provision should be made for appointing a replacement judge, if such a determination of incapacity is made. If the person recovers from the medical, substance abuse, psychiatric, or other condition, the person would return to the bench. We should not assume today that incapacity because of disability is necessarily permanent. In my opinion, a well-conceived scheme would be held to be constitutional.

Finally, we came to the issue of remuneration. In that section of the Report, I suggested that consideration be given to the use of a commission that does not deal with judicial salaries in isolation, but, as in England, the United States, and Australia, as part of the setting of senior or top salaries of others paid from government funds. This would help prevent the masochistic confrontations that seem to be part of the Canadian system. There should be an obligation for the government to respond to the commission's proposals by introducing into Parliament or the legislative assembly its own recommendations based on (but not necessarily identical with) the commission's proposals. In my view, requiring a government response along with a negative or even a positive resolution procedure would be preferable to using binding arbitration.

CHAPTER FIVE: DISCIPLINE

In this chapter we examine the issue of disciplining the judiciary. The Canadian experience is looked at from an historical and contemporary perspective; then follows an exploration of the English and American systems. Codes of conduct are dealt with in the following chapter.

1. JOINT ADDRESS

The only procedure for removing a superior court judge in Canada today is, as set out in section 99 of the Constitution Act, "by the Governor General on Address of the Senate and House of Commons."¹

There was another procedure at common law, that is, by the King's Bench by a writ of *scire facias*. But this form of termination of a property interest, akin to a feudal grant of an estate in land, was never used in Canada, and it can safely be said that if it ever existed in Canada, it no longer does.² No procedure other than the joint address would now be permitted by the judiciary for the removal of superior court judges for misbehaviour without a constitutional amendment.³

We do not know exactly how a joint address in Canada would work because, since Confederation, we have never had a case in which a superior court judge was so removed.⁴ England has had only one such case, and that was an Irish judge, Sir Jonah Barrington, back in 1830.⁵ If a case were to arise, the constitutional experts would reexamine the standard Canadian texts such as Dawson,⁶ Forsey,⁷ and Todd,⁸ as well as the English texts and practices, and dig out the memoranda of law perhaps prepared for the Landreville, Gratton, and other cases. In all cases thus far, the judges resigned before Parliament could vote on their removal. Landreville resigned before the Senate debated the motion,⁹ and Gratton resigned even before the Canadian Judicial Council dealt with the case on the merits.¹⁰

The motion for a resolution for removal would normally be done by a member of Parliament on behalf of the government, as in Landreville, but it could be done by any member of parliament or senator,¹¹ whether on his or her own or on the basis of a petition.¹² Normally, any action by Parliament would be preceded by a formal investigation, such as by a Royal Commission, as in the Landreville case, or, since 1971, by the Canadian Judicial Council. But there is probably no strict necessity for such a prior hearing, although some form of a hearing by Parliament at some stage would be required.¹³ Further, if the Canadian Judicial Council decided that a joint address was not warranted, there would be nothing to stop Parliament from proceeding with an address, although, of course, it would be unlikely to do so. Section 71 of the Judges Act specifically states that nothing contained in the Act relating to investigations by the Judicial Council "affects any power, right or duty of the House of Commons,

the Senate or the Governor in Council in relation to the removal from office of a judge...’’¹⁴

A Special Parliamentary Committee held hearings in the Landreville case, following the practice suggested the year after Confederation by Sir John A. Macdonald.¹⁵ Such a procedure might possibly be omitted today, and the matter referred directly to a committee of the whole House if a full hearing had been held by the Council,¹⁶ but it is likely that the House would want the matter dealt with by a committee, as is now the practice in the U.S. federal system.

The problem with the joint address procedure is that it is a relatively low threshold procedure. It requires only a majority vote of the House and Senate. The framers of the American Constitution did not accept the joint address as a sufficient safeguard for the independence of the judiciary.¹⁷ In the U.S. federal system, removal can be only by impeachment. This requires first that the House vote in favour of impeachment and then that there be a trial before the full Senate, although hearings can be held by a Committee of the Senate.¹⁸ Two-thirds of the Senate must favour impeachment before the judge is removed. Thus, it appears to be more difficult to remove a federal judge in the United States than in Canada.

It is likely that the Supreme Court of Canada will build in some safeguards if the need arises. Otherwise it would be too easy for a government in control of the House and Senate to remove judges. It is not likely that the Supreme Court would state, as the U.S. Supreme Court has done,¹⁹ that the questions are not justiciable. For example, it is possible that the Court would insist upon giving the judge the right to present evidence and cross-examine witnesses.²⁰ So the American adversarial system would likely find its way into our system. Similarly, one would expect clarity in the charge.²¹ There might be other safeguards imposed by borrowing ideas from the Charter, such as relating to the presumption of innocence or to the quantum of proof. But because we have not had cases to test the procedure, it is difficult to say what would be required.

2. GROUNDS FOR REMOVAL

One area in which the courts are likely to control the joint address is by limiting the grounds for removal.

One of the controversies in the past was whether section 99 of the Constitution permits Parliament to remove a judge for conduct other than a breach of ‘‘good behaviour’’. The section reads as follows: ‘‘...the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.’’ As the commentators have observed,¹ the section can be read in at least two ways: the grounds for removal by Parliament can be only for a breach of good behaviour; or the grounds can be wider than ‘‘good behaviour’’.²

In the recent *Gratton* case, the main issue, amongst other issues, was whether Justice Gratton could be removed by Parliament because of permanent incapacity. The Judges Act assumes that a judge can be removed in such a case.³ Justice Gratton was a supernumerary trial judge in Ontario who suffered a “severe and debilitating stroke.”⁴ He did not wish to resign but hoped to be able to do such things as simple consent applications.⁵ The Chief Justice of the trial division disagreed and reported to the Canadian Judicial Council that there was reason to believe that the judge had become “incapacitated or disabled from the due execution of the office of judge by reason of age or infirmity” within the meaning of section 65(2)(a) of the Judges Act.

An Inquiry Committee was established by the Judicial Council composed of three chief justices and two lawyers appointed by the Minister of Justice, as provided in the Judges Act.⁶ Gratton challenged the authority of the inquiry on a number of grounds, including the argument that “incapacity”, as set out in the Judges Act,⁷ is not, constitutionally, a valid ground for removal of a judge. Section 99 guarantees tenure to a superior court judge until the age of 75 during “good behaviour”, and incapacity based on infirmity, it was argued, does not constitute a breach of good behaviour. The Inquiry Committee, chaired by Chief Justice Bayda of Saskatchewan, held on this aspect of the case that section 99 permits removal by Parliament on grounds that are wider than “good behaviour”. This interpretation had the support of most commentators.⁸ No doubt the Committee did not want to categorize a severe medical condition as a lack of “good behaviour”. The majority did not give Parliament *carte blanche* to dismiss a judge on any ground it wished, however, stating that, “constitutionally, those grounds must be determined with the guidance of common law, parliamentary practice and tradition, and whatever additional considerations may be relevant to maintain and enhance the principle of judicial independence in Canada today.”⁹

Chief Justice Poitras of Quebec dissented on this aspect of the case, holding that removal was limited to a breach of good behaviour,¹⁰ but that incapacity due to infirmity could amount to lack of good behaviour. Poitras C.J. stated: “A judge who is unable or unwilling to perform the duties of the office of judge fails to comply with the requirement of holding office ‘during good behaviour’ and may thus be removed.”¹¹

Before the Inquiry could examine the issue of incapacity on the merits, Gratton sought judicial review of the inquiry decision by the Federal Court of Canada. Strayer J. agreed with Poitras that the only ground for removal is “good behaviour”, stating:¹²

In the context of our present constitutional structure, judicial independence, and therefore the public, will be best served if the tenure of superior court judges is deemed to be subject only to removal for a breach of good behaviour...Judicial independence is too important to the balancing of our constitution to leave available, for future choice by Parliament, grounds for removal other than breach of good behaviour.

Strayer went on to hold, however, as did the Inquiry Committee,¹³ that “it is important for continued public confidence in the administration of justice that a person who holds the office of judge not be permanently incapable of fulfilling the office of judge.”¹⁴ A judge could therefore be removed for permanent incapacity. Strayer was prepared to “read down” the word “infirmity” in s.65(2)(a) of the Judges Act to limit it to permanent as opposed to temporary incapacity.¹⁵

As a result of this decision, Gratton J. resigned from office and the Inquiry Committee did not proceed with a hearing on the merits.¹⁶ No appeal was taken from Strayer J.’s judgment. It is likely to be adopted in the main by the Supreme Court of Canada if a case were to reach the Supreme Court.

There will now be controversy on what is the proper meaning of “good behaviour”. Peter Russell correctly observes that “the parliamentary concept of the behaviour which could justify the removal of a judge has traditionally been wider than the common law.”¹⁷ Chief Justice Deschênes stated in his report: “It is well-nigh impossible to put into words what is not ‘good behaviour’. The unpredictability of human conduct will always confound statutory criteria, however carefully drafted.”¹⁸ Will breach of “good behaviour” include chronic alcoholism? severe mental illness? Are these conditions “permanent incapacity”? As discussed in an earlier section, it would be preferable to solve all these disability issues through non-disciplinary means. What if the conduct occurred before the judge was appointed, as in the *Landreville* case? Will this be considered a breach of good behaviour? One would expect the courts to say it can be so considered. Some U.S. federal judges have resigned because of conduct engaged in before appointment that was the subject of prosecution after appointment.¹⁹

No doubt the courts will adopt a general test that can be applied to a variety of cases. I personally like the one suggested by Sir William Anson that Parliament “may extend the term [good behaviour] so as to cover any form of misconduct which would destroy public confidence in the holder of the office.”²⁰ “Destroying public confidence” would easily apply to a serious offence committed before appointment. The Hon. Ivan Rand J. said much the same in the *Landreville* case: “has it destroyed unquestioning confidence of uprightness, of moral integrity, of honesty in decision, the elements of public honour? If so, then unfitness has been demonstrated.”²¹ The Inquiry into the Marshall Affair used the following test: “Is the conduct alleged so manifestly and profoundly destructive to the concept of impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?”²² An earlier Council test, used during the tenure of Chief Justice Culliton as chair of the Judicial Conduct Committee, relating to two judges convicted of impaired driving, was the following:²³

The Council accepts the following principle as a proper criterion in determining whether an act by a judge renders him unfit for continued judicial service. If the conduct, fairly weighed in the light of all the circumstances, has destroyed public confidence in his moral integrity and honesty of judgment—or

has made his judgment suspect, then that conduct renders him unfit to continue his judicial functions.

The Council decided that in each case it could not be said that the conviction rendered the judge concerned unfit for judicial service, but that a recurrence would be of serious concern to the Council. In both cases, there was a repetition of the same or similar offences. In each case, no inquiry or investigation was required, as the judges involved resigned. All four tests set out above look to "public confidence" in the judge.

The important point is that the courts will, to some extent at least, control the exercise of the power of removal by Parliament. Parliamentary action can, I predict,²⁴ be challenged in certain circumstances as a violation of section 99 of the Constitution. No doubt, the Supreme Court of Canada will defer to a considerable degree to Parliament's wishes, but it will probably not give *carte blanche* to Parliament.

3. REMOVAL OF COUNTY COURT JUDGES

There have been four cases of the removal of county court and district court judges in Canada since 1882. Prior to federal legislation in 1882,¹ each province handled the removal process by its own pre-Confederation legislation.² There is no official record of attempts at removal before 1882, but there were no doubt numerous attempts, particularly by opposition parties in election cases.³

Until 1987,⁴ the removal of county court judges (this should be taken here and subsequently as referring also to district court judges) did not require a joint address by Parliament as did the removal of superior court judges. Since 1882, the Judges Act provided that county court judges held office "during good behaviour"⁵ and that the Cabinet could remove a county court judge—in the words of the 1882 Act—"for inability from old age, ill health, or any other cause, or for incapacity or misbehaviour established to the satisfaction" of the Cabinet.⁶ Later Acts were worded slightly differently, but to the same effect. The Revised Statutes of 1952, for example, provided for removal of a county court judge by the Cabinet "for misbehaviour, or for incapacity or inability to perform his duties properly by reason of age or infirmity."⁷

In 1971, the Canadian Judicial Council was established, and the inquiry procedure that we will explore in detail in a later section applied to county court judges in exactly the same manner as to superior court judges.⁸ The only difference was that in the case of superior court judges the removal was by the Governor General after a joint address by Parliament, but in the case of county court judges (until 1987) the Cabinet could remove the judge without a joint address.

The Acts before 1971 provided that Cabinet "may" appoint one or more Supreme Court of Canada or superior court judges to first hold a judicial inquiry. Although the section says "may" not "shall", an inquiry was in fact ordered in all four cases of

removal of county court judges and may possibly have been illegal without such an inquiry.⁹

All four county court removal cases took place in this century. There were apparently no cases in the nineteenth century, although R. MacGregor Dawson cites in his book, *The Principle of Official Independence*, that two Ontario judges resigned in 1883 and 1897 respectively after a commissioner was appointed.¹⁰ The allegations included drunkenness in both cases, with the added charge of gross partiality in another. Dawson states: "The charges were well sustained; and if the judges had not consented to retire they would undoubtedly have been removed by the Governor in Council."¹¹

The four cases of removal¹² are: Judge Fitch of Ontario in 1915,¹³ Judge Maulson of Manitoba in 1928,¹⁴ Judge Stubbs of Manitoba in 1933,¹⁵ and Judge Martell of Nova Scotia in 1933.¹⁶ In the Martell case, the judge was removed for issuing dishonoured cheques and for drunkenness.

The Stubbs case is a fascinating story described in detail by Dale and Lee Gibson in their book *Substantial Justice*.¹⁷ Stubbs was an outspoken "socialist" judge who had been appointed by the Liberals in 1922. (He had travelled from his small town of Birtle, Manitoba, in 1919 to offer his services in defence of the leaders of the Winnipeg General Strike.) In one controversy, he prepared a pamphlet and held a public meeting criticizing the Manitoba Court of Appeal for disagreeing with his actions in a wills case. He was famous for his outspoken comments on the bench. "I am always very suspicious of police evidence," he stated in one case, "...their evidence is nearly always biased."¹⁸ "Lying is lying," he said in another case to a person about to be sentenced, "...whether done by the Attorney-General of the province on the floor of the Legislature in defaming one of His Majesty's judges, or whether done by a humble citizen like yourself."¹⁹ The Attorney General along with the King's Bench and Court of Appeal judges joined in a petition to the Liberal federal Minister of Justice. No action was taken, but when the Conservatives took over the government, a commissioner was appointed under the Judges Act to determine whether Judge Stubbs was guilty of misbehaviour. Mr. Justice Frank Ford of Alberta, the commissioner, held that Stubbs' attacks on the superior court judges of Manitoba "did great harm to judicial institutions in Manitoba" and were grounds for dismissal. He also held that it was improper to call the Attorney General a liar without justification. However, his controversial statements in court, Justice Ford stated, were not grounds for dismissal, although "indiscreet and unconventional"; to dismiss him because of his statements in court would be "a dangerous interference with judicial independence."²⁰

4. SUPERIOR COURT JUDGES

In total, there have been five cases since Confederation in which Parliament has considered the removal of a superior court judge. Four of these were in the nineteenth

century and one, the *Landreville* case, in the twentieth. There have, of course, been many more cases in which the executive has considered the question.

The first petition for removal received by the House was in 1868, and was against William Young, the Chief Justice of Nova Scotia. Young seems to have been a vain, outspoken, controversial judge who had been intimately involved in politics before his appointment. It is not clear what the petition, which was not published, alleged. The six-page article on Young in the *Dictionary of Canadian Biography* does not mention any serious misconduct.¹ No action was taken on the petition.²

The next petition was also in 1868 and involved Justice Aimé LaFontaine of the Supreme Court of Quebec.³ Justice LaFontaine and another pre-Confederation Quebec judge, Justice Lewis Thomas Drummond, had apparently caused great concern in the Ottawa District. The M.P. who introduced the petition against Justice Drummond stated in the House: "There [is] grave reason to fear that if an investigation [is] not granted in such cases, the people would take the law into their own hands."⁴ There was considerable debate on whether the petition should be accepted and what the role of the government should be in the process. Sir John A. Macdonald, the prime minister, stated in the House that he "utterly dissented from the idea that the Government should initiate proceedings. It was destructive of the doctrine that the Bench should be equally independent of the Crown and the people."⁵ He wanted a Select Committee to meet and arrange the mode of procedure and to meet again in the next session to proceed with the inquiry.⁶ A Select Committee apparently met to discuss procedures,⁷ and the following year, 1869, a fresh Select Committee examined the issue, but no further action was taken by Parliament.⁸ LaFontaine did not warrant an entry in the *Dictionary of Canadian Biography*. His name comes up, however, in an entry for another Quebec judge, Levi Ruggles Church, who in 1863, as a young lawyer along with other lawyers, sued Justice LaFontaine for embezzlement.⁹ Whether the petition was related to that lawsuit is not known.¹⁰

The third petition dealt with by the House was against Justice Thomas J.-J. Loranger of Quebec. Petitions were filed in 1874, 1875, and 1876, and in 1877 the matter went to a Select Committee. The Committee heard nearly 200 pages of evidence, which included evidence of twelve witnesses called and examined personally by Judge Loranger. The Committee found against the complaint.¹¹ Loranger went on to have a distinguished career as a jurist and author.

Chief Justice Edmund Burke Wood of Manitoba was the subject of a petition in 1881 "on the grounds of partiality, dishonesty, and insobriety," to use the words of the *Dictionary of Canadian Biography*.¹² The *Dictionary* goes on to state: "He was now a pathetic figure, partially paralysed by a series of strokes, with poor hearing and barely coherent speech."¹³ The controversial judge¹⁴ collapsed in October 1882 while hearing a case and died that evening of a stroke, which stopped the Parliamentary process before a Select Committee could be established.

5. LANDREVILLE

The Landreville case in 1966 is as close as Canada has come to removing a superior court judge. Because of its importance in setting the stage for the establishment of the Canadian Judicial Council's discipline procedure, the facts and the process used will be set out in some detail. Professor William Kaplan of the University of Ottawa Law School is finalizing a manuscript on the controversy, tentatively titled *Bad Judgment: The Case of Mr. Justice Landreville*, that is both revealing and instructive.¹

The chronology of the case is as follows.² Leo Landreville became mayor of Sudbury in January, 1955. While he was mayor, the Sudbury Council approved a franchise to Northern Ontario Natural Gas Limited (NONG) to distribute natural gas to Sudbury by pipe lines. Shortly thereafter, Landreville was given an option (without payment) to buy NONG shares. In September, 1956, he was appointed a judge of the Supreme Court of Ontario.

In early 1957, Landreville was sent a letter from a Vancouver brokerage company enclosing shares of NONG. He sold them all in the first three months of that year, netting \$117,000. The following year, the Ontario Securities Commission directed an investigation into the trading in shares of NONG, and it issued a report in the summer of 1958. In 1962, on the basis of information supplied by the Attorney General for British Columbia, another investigation was directed. Landreville gave evidence at this hearing as to how he had acquired 10,000 shares in NONG. Landreville also testified in 1963-64 at the perjury trial of the president of NONG.

On June 12, 1964, Landreville wrote to the Minister of Justice, Guy Favreau, regarding the fact that there had been insinuations in the Ontario Legislature that both NONG and he had been guilty of corrupt practices. He requested that an inquiry take place and that a commissioner be appointed to provide him with an opportunity to clear his name. Before this request was dealt with, in August, 1964, the Attorney General for Ontario, laid charges against Landreville for accepting stock in NONG in return for his influence in seeing that NONG obtained a franchise agreement in Sudbury and for conspiracy with the president of NONG. The Magistrate discharged Landreville at the preliminary hearing in the fall of 1964, expressing the view that a properly charged jury could not find him guilty. The Attorney General then issued a press release stating that the matter had been concluded. However, in January, 1965, the Law Society of Upper Canada struck a special committee to consider and report on what action, if any, should be taken "as a result of Mr. Justice Landreville's decision to continue to sit as a Judge."³ Its confidential report was made in March, 1965, and adopted by Convocation in April, 1965. The report contained a statement of facts and conclusions. One conclusion was that the Magistrate was correct in dismissing the charges, but it also concluded that there were other unanswered questions and that inferences could be made of impropriety. The Law Society decided to "deplore the continuance"⁴ of Judge Landreville as a member of the Ontario bench.

A copy of this confidential report was sent to the Minister of Justice and to Landreville. Prior to this, Landreville had known nothing of the Law Society's activities. In May, 1965, Landreville wrote the Minister to comment on the Law Society's report. He stated that the report was unfounded and that the matter should have been closed. During the summer and fall of 1965, a great deal of correspondence passed between Landreville, his counsel, J. J. Robinette, and the new Minister of Justice, Lucien Cardin. Robinette argued that the government did not have the power to appoint a Commissioner under the Inquiries Act and that the only person who has any jurisdiction over the behaviour of a superior court judge was the Governor General and then only on address of the Senate and the House of Commons, as stipulated in s.99. Robinette then requested that the question be referred to the Supreme Court of Canada. Cardin replied in December, 1965, disagreeing with Robinette's contention and rejecting the idea of a reference to the Supreme Court. He stated: "There is no doubt that Parliament itself has the right and the power to make an inquiry into the conduct of a judge, and such an inquiry could be instituted on the motion of any member of the House, whether he is a member of the Government's side or not."⁵ Cardin suggested further that the government's power under s.99 was quite wide:⁶

The question is not so much whether the Judge has breached the condition of his office, namely, that it be held during good behaviour, but whether he has in the opinion of Parliament conducted himself in such a way as to render himself unfit to hold high judicial office. Under section 99 of The British North America Act, a judge may indeed be removed for "misbehaviour", but the power to remove on address extends to any ground and it is open to Parliament to make an address for the removal of a judge on any ground it sees fit, whether it constitutes misbehaviour in office or not.

Cardin then stated that an inquiry under the Inquiries Act was originally thought to be preferable to Landreville, but that if Landreville objected to this procedure, an inquiry would instead be conducted by Parliament.

Following this letter, Robinette sent a telegram to Cardin to advise him that Landreville was requesting that the government appoint a Commissioner under the Inquiries Act. Cardin then made a statement in the House to the effect that Landreville had requested an inquiry under the Inquiries Act. On January 19, 1966, Letters Patent and terms of reference were issued to the Hon. Ivan C. Rand, a former justice of the Supreme Court of Canada. In March and April 1966, Rand held hearings over an eleven-day period in Vancouver, Sudbury, Toronto, and Ottawa, and issued his report on August 11, 1966.⁷

The Hon. Ivan Rand concluded that Landreville J. was unfit for the proper exercise of his judicial functions on three grounds:⁸

- a) That notwithstanding the result of the preliminary inquiry, the stock transaction, for which no valid consideration was given, "gives rise to grave suspicion of impropriety."

- b) That in the subsequent investigation before the OSC and during the NONG president's trial, the conduct of Landreville J. in giving evidence "constituted a gross contempt of these tribunals and a serious violation of his personal duty as a Justice of the Supreme Court of Ontario, which has permanently impaired his usefulness as a judge."
- c) Treated as a single body of action, the conduct of Landreville J. from the dealing of the franchise proposal in the spring of 1956 to the concluding portion of which, "trailing odours of scandal arising from its initiation and consummated while he was a Judge of the Supreme Court of Ontario, drawing upon himself the onus of establishing satisfactorily his innocence, which he has failed to do, was a dereliction of both his duty as a public official and his personal duty as a judge, a breach of that standard of conduct obligatory upon him, which has permanently impaired his usefulness as a Judge."

Rand concluded by stating that "in all three respects, Justice Landreville has proven himself unfit for the proper exercise of his judicial functions."⁹

The report was tabled in the House of Commons in August, 1966. A special joint committee of the Senate and the House of Commons was appointed in late 1966. Its purpose was to "enquire into and report upon the expediency of presenting an address to His Excellency praying for the removal of Mr. Justice Leo Landreville from the Supreme Court of Ontario, in view of the facts, consideration and conclusions contained in the report of the Honourable Ivan C. Rand."¹⁰ The committee held 19 meetings in February and March of 1967. Landreville appeared as a witness and testified at 11 of the meetings. The committee tabled its report in April, 1967, recommending the presentation of an address to the Governor General for the removal of Justice Landreville.

The minister of justice, Pierre Trudeau, told the House on May 31, 1967, that resolutions for removal would be introduced.¹¹ On June 6, 1967, Senator Dan Lang moved a notice of motion for an Address to the Governor General. No debate on the motion took place, however, as on June 7, 1967, Justice Landreville submitted his resignation.¹² In his letter, Justice Landreville cited the impairment of his "health and wealth" as the reason for his resignation, and noted that in "any event my usefulness as a judge has been destroyed by the publicity and harassment arising out of such proceedings."¹³ He continued to deny the charges against him and defended his judicial record: "I have fully and faithfully discharged my judicial duties. There has been no criticism of my conduct in this area and my integrity as a judge was not made an issue before Mr. Justice Rand...In my personal life, as mayor, solicitor or citizen, I repeat emphatically and reaffirm my innocence of any wrongdoing in law or ethics. But I cannot remove unfounded suspicions."

In 1977, Landreville commenced an action in the Federal Court, attacking the validity of the appointment of the Commissioner to hold the inquiry, the manner in which

certain aspects of the inquiry were carried out, and the report itself. Justice Collier of the Federal Court held that s.99 does not preclude a judicial inquiry prior to joint address proceedings in Parliament. However, Justice Collier went on to hold that Ivan Rand had erred procedurally by failing to give proper notice, as required under s.13 of the Inquiries Act, of the charge that Landreville had committed “gross contempt” in giving evidence to the OSC and at the NONG president’s trial. This decision was of assistance in enabling Landreville, in 1981, to obtain an *ex gratia* payment of \$250,000 from the Liberal Cabinet in lieu of the pension it had refused him when he resigned in 1967.¹⁴

6. CREATION OF THE CANADIAN JUDICIAL COUNCIL

The Canadian Judicial Council was created by statute in 1971.¹ There were many factors influencing its creation. The Council, composed entirely of chief justices and associate chief justices, was a statutory recognition of the role that the chief justices had been assuming in their annual meetings for the past few years. Professor John Edwards of the Centre of Criminology at the University of Toronto had been responsible for convening the first meetings of chief justices in 1964 and 1965. Chief Justice Edward Culliton of Saskatchewan was elected as the first chair. On his retirement in 1981, Culliton publicly gave credit to John Edwards for establishing the Conference of Chief Justices and therefore, indirectly, the Canadian Judicial Council:²

Fortunately in 1964 John Edwards, of the Centre of Criminology at the University of Toronto, suggested that a conference of provincial Chief Justices would be a beneficial development...It was the conference of Chief Justices that established the Seminars for Superior and County Court Judges, but even more important, the conference saw the need for strengthening the independence of the Judiciary — to clearly establish once and for all that Judges were not civil servants but rather independent members of the third branch of Government. It was in the pursuit of this objective that the Canadian Judicial Council was established. The idea originated at the conference of Chief Justices — the legislation was drafted by Chief Justice Jackett and was adopted by Mr. Turner, then Minister of Justice. As a result the Canadian Judicial Council came into being in 1971.

The minister of justice, John Turner, had pointed out in the House two years prior to the establishment of the Council “that the annual conference of the Chief Justices of Canada...is now well established...this conference enables all the Chief Justices to meet to discuss problems that are common to them in relation to the administration of justice.” This objective was reiterated by Albert Béchar, the parliamentary secretary to the Minister, on second reading of the 1971 Act: “The Council will provide a national forum for the judiciary in Canada, and its dominant purpose will be to strive to bring about greater efficiency and uniformity in judicial services and to improve their quality.”⁴

Another reason for its establishment was to formalize the use of educational programs. Again, John Turner had foreshadowed this development two years earlier when he told the House about the annual conference that had just concluded and that had been established by the chief justices of Canada and sponsored by the federal government. "We sent the judges back to school," Turner proudly announced, perhaps not realizing the controversial nature of such a statement. He went on to say—adopting more acceptable language—that "the seminar will be an annual event sponsored by the Council of Chief Justices."⁵

Discipline was, of course, another reason for the formal establishment of the Council. Indeed, in the view of many of those who played a role in its creation, it was the main reason. The government and the chief justices wanted the judiciary to "become to some extent, a self-disciplining body"⁶. One chief justice actively involved in setting up the Council had been a deputy minister of justice and felt it was wrong for the Department to be dealing with routine complaints against judges.⁷ The Act, the parliamentary secretary stated on second reading, "contemplates that the Council will report the findings of any inquiry to the Minister of Justice. There would continue to be the requirement for an Address by both Chambers to the Governor General requesting the removal of a superior court judge from office as required by section 99(1) of the BNA Act."⁸

There is no doubt that the awkwardness and uncertainty of the Landreville proceeding was a factor motivating Parliament to adopt this new procedure, although there were surprisingly few specific references to Landreville in the debates.⁹ Still, it must have been in the parliamentarians' minds. As Peter Russell states: "The Rand Inquiry in the Landreville case did not provide an impressive precedent for the use of a single-judge royal commission in removal proceedings...The creation of the Canadian Judicial Council in 1971 and the statutory role it now has in the removal process is a distinct improvement over the one-judge ad hoc inquiry."¹⁰ One of the chief justices actively involved in setting up the Council referred to the "awful fiasco" of the single-commissioner approach in Landreville.¹¹ And John Turner, the then minister of justice, later stated in an interview:¹²

We felt that after the *Landreville* case it was a better vehicle for the self-discipline of the Bench than the Inquiries Act. And that a lot of these matters could be handled more discreetly at an earlier stage by the judges themselves with the [Council] than allowing an issue to deteriorate and then go public under the Inquiries Act.

There is no indication in the parliamentary debates that the Council should concern itself only with conduct that would result in removal, although the Judicial Council later appears to have taken that approach.¹³ The Act, it was stated in the House, was designed to improve the quality of judicial services.¹⁴ Consistent with this underlying concept, the parliamentary secretary went on to say, "the Canadian Judicial Council will have power to carry out investigations of any complaint made regarding the conduct of members of the bench."¹⁵ Removal was not the only reason for

establishing the disciplinary aspects of the Council.¹⁶ Eldon Woolliams, the Conservative justice critic, gave a specific example of the functioning of the Council, when a judge has inordinately delayed rendering judgments:¹⁷

That is the kind of thing which would be reported to this council...They would then call the judge in and suggest that he get back on the job and write these judgments. We have had judges like that. If a judge did not follow the suggestion, the matter would be reported to the minister who would take the matter to the cabinet. The cabinet would then bring in a resolution to be considered by the two Houses of Parliament.

One of the chief justices involved in the creation of the legislation who had earlier been in the Department of Justice noted that “the biggest problem was inordinate delays in judgments.”¹⁸ The Judicial Council has adopted Eldon Woolliams’ suggested approach in a number of subsequent cases.¹⁹

The Department of Justice, at my request, looked at the files from the relevant years, but surprisingly could find nothing in the way of a policy paper or memorandum to Cabinet.²⁰ This suggests to me that the Judicial Council features of the Act were drafted, as some of the early participants now recollect in their oral histories, by Donald Maxwell, the deputy minister of justice, and by the Chief Justice of the Federal Court, Wilbur Jackett, who had himself been a deputy minister of justice. The press release issued at the time shows that in the Department’s mind the Council would not be limited to cases that could amount to dismissal. The release stated:²¹

The Council...will have the continuing responsibility of ensuring the self-disciplining of the judiciary by holding inquiries and investigations under the Judges Act. It is intended that the Council will provide a forum where complaints or grievances in respect of the federally appointed judiciary can be considered and dealt with effectively and in accordance with our well established tradition of judicial independence.

Another Department of Justice background document stated that prior to the creation of the Council, the Minister had to investigate complaints and went on to state:²²

This was a most distasteful function for the Minister and one which involved him directly in the affairs of the judiciary and exposed him to criticism for such involvement. With the amendments to the Judges Act, the Council was assigned the responsibility for assessing and disposing of complaints and allegations about the conduct of federally-appointed judges.

The concept of discipline by a judicial council had been established in 1968 in Ontario for provincial court judges, following an early volume of the *McRuer Report on Civil Rights*.²³ In a later report, McRuer had recommended that a similar structure be available in Ontario for federally appointed judges. He wrote:²⁴

In providing for a Judicial Council to exercise some non-political supervision with respect to the provincial judges the Province has accepted the principle of giving to the citizen means by which he may have his complaints with reference to the administration of justice considered. It can be reasonably argued that similar provision should be made with respect to the Supreme Court of Ontario and the county and district courts when the need arises. There is, no doubt, some supervision of unofficial character exercised by the Chief Justice of Ontario, the Chief Justice of the High Court and the Chief Judge of the County and District Courts but such supervision can only be of a consultative and advisory character. They have no investigatory powers.

He recognized that “there may be some constitutional limitation on the power of the province to pass a statute clothing anybody with complete supervisory power over the conduct of judges appointed by the Governor General.”²⁵ Nevertheless, he concluded that the province had constitutional authority to create a body to consider “complaints lodged by citizens with respect to the conduct of judges in the administration of justice.”²⁶ “The matter as we state it,” he wrote, “is essentially a matter pertaining to the administration of justice in the Province and within the powers conferred on the Legislature.”²⁷

No doubt, there were similar constitutional discussions in the Department of Justice in Ottawa and amongst the chief justices, and it was probably felt that the better course was to use the chief justices of Canada as the disciplinary tribunal. As previously stated, the chief justices were already meeting as a group. Moreover, the Chief Justice of Ontario, G. A. Gale, was a very strong supporter and one of the key players in setting up the Council.²⁸ The Minister of Justice had received the approval of the Conference of Chief Justices, all ten provincial Attorneys General,²⁹ and the Canadian Bar Association.³⁰ This was the period of the establishment of a strong federal presence in a number of legal areas—a national law reform commission,³¹ the new Federal Court of Canada,³² and a national legal aid program.³³ A strong national disciplinary body was consistent with this approach.

7. CANADIAN JUDICIAL COUNCIL PROCEDURES

The procedures for handling complaints adopted by the Canadian Judicial Council have evolved over the past 25 years. The changes have been in part a function of the growth in the number of complaints. In the early years, the Council received very few complaints and they were all reviewed by the seven-member Executive Committee.¹ It was not until the fifth year of the Council’s existence that there were more than 10 complaints a year filed against specific judges. Later, the Executive Committee handled complaints through correspondence amongst its members. In 1976, the chair for the first time dealt with a complaint without first referring it to the judge and the judge’s chief justice.² The last major change was in 1992, when the by-laws were significantly changed³ on grounds of procedural fairness to help ensure that members of Council

considering complaints had not been involved in prior deliberations on the case. The growth in numbers and the consequent burden on the chair has caused the Council to provide for the designation of more vice-chairs to handle complaints.

The Canadian Judicial Council's by-laws give the Judicial Conduct Committee the power to act for the full Council in the initial stages of the complaint process.⁴ The Judicial Conduct Committee has, in fact, the same composition as the eleven-member Executive Committee of the Council. The Chief Justice of Canada, who chairs the Executive Committee, and who might be called on to sit on an appeal involving disciplinary cases, does not chair the committee and does not participate in specific cases,⁵ but may take part in general policy discussions. For almost six years, from 1988 to 1993, Chief Justice Guy Richard of New Brunswick chaired the Committee. Chief Justice Lorne Clarke of Nova Scotia then took over as chair on an interim basis for several months until Chief Justice Allan McEachern of British Columbia took over in February, 1994.

When a complaint comes in today, the Executive Director of the Council passes the complaint along to the chair (or in appropriate cases, a vice-chair) with, in about two-thirds of the cases, her own observations on what procedures she thinks should be followed, such as whether comments should be requested from the judge who was the subject of the complaint.⁶ Not surprisingly, the practices vary somewhat from chair to chair. The chair can close the file without further reference to the Judicial Conduct Committee or can send the complaint on to a panel of the Committee—normally a three-person panel,⁷ although the by-laws provide for up to five members—who consider what further action should be taken. If the panel feels that a formal investigation under section 63(2) of the Judges Act is warranted, it reports its view to the full Canadian Judicial Council, who decide (without participation by the members of the panel)⁸ whether the recommended formal investigation by an Inquiry Committee should be undertaken. The Judicial Conduct Committee no longer acts collectively in individual cases. It acts as a committee for policy matters.

An Inquiry Committee can be established in one of two ways: by the Council itself under section 63(2) of the Judges Act, as discussed above, or at the request of the Minister of Justice or provincial attorney general under section 63(1). However set up, the composition of the Inquiry Committee, which conducts the formal investigations, is not set out in the Judges Act or the by-laws,⁹ but it has in the two most recent formal inquiries (Gratton and the court of appeal judges in the Marshall case) consisted of three members of the judiciary and two members of the bar designated by the Minister of Justice.¹⁰ Since 1992, the judges selected to conduct the inquiry would not have participated in the earlier Judicial Council discussions because the by-laws provide that up to five members of the Council, designated by the chair of the Judicial Conduct Committee in advance of the Council discussion, should not participate in the Council's deliberations.

The Inquiry Committee reports back to the Council with its recommendations, including a possible recommendation that “the judge be removed from office.” Section 65 of the Judges Act reads as follows:¹¹

65. (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under sub-section (1), may recommend that the judge be removed from office.

Since the 1971 amendments to the Judges Act there have been no recommendations by the Council to the Minister that a judge be removed from office. In a later section, we will look at the cases where a formal Inquiry was conducted.

Let us go back to the initial screening of cases by the Executive Director and the Chair of the Committee. The Executive Director sets up a file for each signed complaint received by the Council that identifies a specific judge or group of federally appointed judges.¹² If the complaint is a general complaint that does not name a specific judge or judges or if the complaint is against a provincially appointed judge, to give another example, a file is not established. But a complaint that simply complains about the result of a case and is a matter for appeal will be classified as a complaint and will be sent to the chair of the Judicial Conduct Committee. So will a communication from a member of the Judicial Council that draws “to the attention of the Executive Director any conduct of a judge of that member’s court which, in the view of the member, may require the attention of the Council.”¹³

The chair of the Committee may close the file without seeking comments from the judge involved or the judge’s chief justice, although both will later be notified of the complaint and the chair’s explanation to the complainant.¹⁴ Comments are normally not requested if the file is closed by the chair on the basis, in the words of the by-law, that “the matter is trivial, vexatious or without substance.”¹⁵ The file can also be closed by the chair after obtaining comments from the judge and his or her chief justice where “the matter is without substance or where the conduct clearly is not serious enough to warrant removal.”¹⁶ The vast majority of complaints are by parties to litigation. In 1993-94, 127 out of 158 complaints were by parties to litigation, and

another 10 were by non-parties who had a direct interest in the outcome. In the vast majority of these 137 cases, the chair would explain to the complainant that the proper avenue of complaint is by way of appeal.

The number of complaints filed each year are set out in the Canadian Judicial Council's Annual Report. Multiple allegations against a judge involving the same incident are treated as one complaint.¹⁷ Numbers before 1986-87 are not currently available, although they are being collected for the Annual Report on the 25th anniversary of the Council, which will be in 1996. Before the current Executive Director took over in 1986, all letters were categorized as complaints, even if they did not relate to a specific judge or judges.¹⁸ The Executive Director estimates that for the 15 years before 1986, there will be about 350 complaints against specific federally appointed judges. As we will see in the discussion of the American material, this is far lower than the number of complaints against U.S. federal judges, and the number of judges in each jurisdiction is approximately the same. The figures from the annual reports for the years 1987-1994 are as follows:¹⁹

COMPLAINT FILES

	OPEN AS YEAR OPENED	OPEN AS YEAR BEGAN	TOTAL CASELOAD	CLOSED	CARRIED INTO THE NEW YEAR
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1986-87	44	18	62	50	12
1987-88	47	12	59	52	7
1988-89	71	7	78	70	8
1989-90	83	8	91	77	13
1990-91	85	13	98	82	16
1991-92	115	16	131	117	14
1992-93	127	14	141	110	31
1993-94	164	31	195	156 ²⁰	39

The dramatic rise in the number of complaints between 1992-93 and 1993-94 may be due to a number of factors. It may be because of the publicity given to several high-profile cases in Ontario (the *Hryciuk* case)²¹ and Quebec (in particular the *Verreault* case).²² Although these cases dealt with provincial court judges, the coverage was nationwide. Indeed, both the *Hryciuk* case and the *Verreault* case became known outside Canada, with the latter even being the subject of an Ann Landers column.²³ It may also be because the Chief Justice of Canada was widely quoted as saying (in

response to the report by the Hon. Bertha Wilson on gender equality for the Canadian Bar Association)²⁴ that if anyone has a complaint about gender insensitivity by a federally appointed judge, he wants to hear about it. Chief Justice Lamer was quoted as saying in early January, 1994: “If there are judges that are misbehaving or are making sexist or racist comments, I want to know and I want to know who.”²⁵ The number of complaints in January and February, 1994 was 19 and 18 respectively, compared to November and December, 1993, in which the number of complaints was 4 and 8 respectively.²⁶ It could, of course, also be that there is greater cause for complaints. In any event, there is greater sensitivity to insensitive judicial conduct today by litigants and others than in the past. Another factor—although this is very speculative—is that with the tightening up of legal aid across the country, more persons are appearing in court unrepresented and may be more inclined to complain to the Council than if they were represented. At least 42 of the complaints in 1993-94 were by litigants who were not represented by counsel.²⁷ Unfortunately, comparable figures for earlier years are not readily available.

The complaints—at least for the past year—are more or less evenly distributed across the country in proportion to the number of federally appointed judges from each province and territory, with the exception of Ontario, which has a somewhat higher proportion.²⁸ Whether the Ontario figure reflects a true higher number of complaints or the publicity given to the *Hryciuk* and other cases, or something else, is not known.

The Council has for some time been keeping track of the type of allegations made. The largest single source of complaint each year involves family law matters. In 1992-93, they accounted for 31 percent of the files dealt with during the year.²⁹ As the Annual Report states: “The statistics are not surprising because, when family matters are the source of dispute, feelings naturally run high over issues involving children, financial and property assets. It is not unusual to see disappointed litigants at odds or suspicious of the outcome of their cases.”³⁰ Complaints in family law and other matters often involve allegations of gender, racial, or religious bias. In the 1993-94 year, about 20 percent of the cases closed during the year alleged bias. In the case of gender bias, the number alleging bias against men was slightly higher than that alleging bias against women.³¹ In 1992-93, the number of complaints by men alleging gender bias was the same as the number by women.³² There is, of course, a large range of other grounds of complaint. Conflict of interest complaints are made in a number of cases, as are allegations of delay in rendering judgment. One also sees allegations that the judge was rude, or about the judge’s harsh treatment of a witness. Each year the Annual Report describes the type of cases dealt with by the Council. The 1992-93 Annual Report contains six full pages, and the 1993-94 Annual Report contains 10 pages, on complaints. The examples used will not be recited again here.

The Council gave me full access to all of their complaint files. Over the course of my research, I spent several days examining the files, particularly those in the past several years. My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being “covered up” by the Council after a complaint was

made to it. The descriptions in the Annual Reports—at least for the past few years—in my view appear accurately to reflect the complaints that have been received by the Council. Naturally, my view on the actual handling of individual files would occasionally differ from that of the chair of the Committee, but that is not surprising when dealing with difficult issues.³³

The overwhelming majority of files are closed by the chair on his own authority. In the year 1992-93 (April 1, 1992 to March 31, 1993) 110 files were closed, and 104 of them, that is, 95 percent, were closed without reference to the Judicial Conduct Committee or the Council.³⁴ The majority of the files (65 out of 110) were closed without requesting comments from the judge or his or her chief justice.³⁵ The 1993-94 pattern is similar, with 94 percent closed by the chair (147 out of 156 files) and of those closed, about 55 percent were closed without comments being requested (86 out of 156).³⁶

During the 1992-93 year, six cases were referred to a panel or, in some cases, as the procedure at the time was for part of the year, to the Judicial Conduct Committee. Five of the cases did not go past this stage. In one of these cases, where the complaint was that the judge criticized government policy in a judgment (the “zero tolerance” policy for domestic violence), the Committee informed the complainant that the issue was a matter for appeal to a higher court.³⁷ Perhaps about 40 percent of the files are closed by the chair on this basis.³⁸ In another case, the judge had delayed rendering a judgment for two years and it was found that there were a number of other cases involving the judge where there was more than a six-month delay. The Committee advised the judge and his chief justice that this was an extremely serious matter that could merit a full inquiry if left unresolved. The judge subsequently retired, as he was entitled to do (but, it should be added, delivered judgments in the required time in the outstanding cases). The Committee wrote the complainant that the inordinate delay was “unfortunate”.³⁹

A judge’s conduct was criticized in several other cases that progressed beyond the chair that year. Although the power to reprimand is not set out in the Act, the Council has received a legal opinion that it is not improper for the Council to criticize a judge’s conduct.⁴⁰ In the past, the chair would sometimes use critical language on his own authority. Now, a case must be sent to a panel before critical comments are made that are communicated to the complainant.⁴¹ In one of the 1992-93 cases, for example, the Committee stated that the judge showed a “regrettable” lack of respect for counsel, one of whom was the complainant. The complainant was told that although the judge’s behaviour was “regrettable”, it did not constitute misconduct sufficient to warrant a formal investigation. In another case, a provincial Attorney General filed a complaint about a judge for comments that allegedly were sexist and racist in nature. The judge appeared to view his comments as “harmless banter,” but told the committee that he was “ready, willing and able to avoid such comments in the future.” The panel told the judge that his conduct was “improper and simply unacceptable” for a person holding judicial office. In another case, a law professor criticized a judge’s allegedly insensitive remarks during a lunch-time conversation at a conference. The Committee

expressed its regret to the complainant that she had found the judge's remarks unsettling and noted that as a result of the complaint the judge would perhaps be more sensitive about how his remarks might affect others. In two of the three cases that went beyond the chair in 1991-92, the complainant and the judge were advised that the Committee disapproved of the judge's conduct.⁴²

Only one file in the 1992-93 year went to the full Council, and that was the *Gratton* case,⁴³ in which the Council concluded that there should be a formal investigation and designated three of its members to be members of the Inquiry Committee. As previously stated, the Inquiry Committee was established which included two members of the Bar appointed by the Minister of Justice, and was challenged in the Federal Court, which upheld the power of the Inquiry Committee to proceed. The judge retired, as he was entitled to do, before a hearing on the merits could take place.

In 1993-94, seven files went to a panel, but none went on to the full Council.⁴⁴ Two of the cases in 1993-94 that went to a panel involved a fact-finding investigation by an outside counsel. In one case, the investigation was ordered by the chair of the Judicial Conduct Committee; in the other, by the panel itself. There was one other independent fact-finding investigation in the year that did not lead to a panel. In 1992-93, only one of the six cases that went on beyond the chair used an independent counsel as a fact finder.⁴⁵ In the previous year, 1991-92, two of the three cases that went beyond the chair used an outside fact-finding counsel.⁴⁶

An examination of the panels established in 1991-92 shows a number of other features worth noting. In two of the three cases in which a panel was established, the Committee took the exceptional step of announcing its decisions in public statements. They did this, the Annual Report explains, because the allegations "had received wide public attention."⁴⁷ This has been done in later cases. In one, there was a press release even though the case did not go on to a panel.⁴⁸

Another feature seen in the 1991-92 files is that two cases were not proceeded with by the Judicial Conduct Committee because in one case the judge retired for health reasons and in another a judge charged with a summary conviction offence resigned—again for health reasons—and his resignation was accepted by the Cabinet. In both cases, a pension was granted. Issues relating to incapacity through disability were discussed in chapter 3 of this Report.

A further point worth examining is the role of the Minister of Justice of Canada and the provincial attorneys general in the complaint process. The 1971 Judges Act gave them the power to order an Inquiry. Section 63(1) of the present Judges Act provides that the "Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior...court...should be removed from office..."⁴⁹ The section appears to give an attorney general of one province the power to order an inquiry concerning a judge of another province, but no doubt the section would be interpreted more narrowly by the Council and the courts. In some cases the attorney general or the Minister of Justice has requested only that

the Council consider a complaint under section 63(2) of the Act, which provides that "the Council may investigate any complaint or allegation made in respect of a judge of a superior...court." There were no requests under either category in 1993-94 by the Minister of Justice of Canada or by a provincial attorney general.⁵⁰ In 1992-93, however, there were two cases in which a provincial attorney general filed a complaint, but did not specifically request a formal Inquiry.⁵¹

There have been eight cases where a formal Inquiry has been initiated under the Judges Act since the creation of the Canadian Judicial Council in 1971. Three of these have been under section 63(1), one at the request of the attorney general of a province and two by the Minister of Justice. Five other cases, including the well-known *Berger* case in 1981 and the *Gratton* case in 1994, were under section 63(2) of the Act, which reads as follows: "The Council may investigate any complaint or allegation made in respect of a judge of a superior or county court or of the Tax Court of Canada." All five cases were the result of a complaint by another judge, and in three, by the judge's own chief justice. In none of the eight cases did the full Council recommend that removal be sought. In three of the eight cases, the judge resigned before a hearing was held; in two, he resigned during or shortly after the hearing; and in the remaining three, the Inquiry did not recommend removal.

The public Inquiry in 1990 into the Court of Appeal judges in the *Marshall* case was requested under section 63(1) by the Attorney General of Nova Scotia and is, of course, well known. It will be dealt with below. The other two Inquiries (both requested by the Minister of Justice), were not open to the public and occurred before the annual reports had commenced which would necessarily have brought them to the attention of the public, at least in a sanitized form. One of these cases was requested by the minister of justice, Ron Basford, in 1977. The Minister did not request that the hearing be a public one and neither did the judge.⁵² The Minister had received a police report that a superior court judge had on two occasions paid for dancers to come to his hotel room. The judge claimed that in one case he simply talked and in the other the person just danced. The three-person Inquiry Committee, composed of three chief justices and assisted by counsel, concluded that removing the judge from office "would be a punishment out of all proportion to his imprudent action."⁵³ The Inquiry Committee referred to "the unfortunate nature" of the judge's conduct. The Inquiry Committee's report was accepted by the full Council, and the Minister of Justice was so advised. The third case under section 63(1) was requested by Mark MacGuigan, the minister of justice, in 1983 and involved, *inter alia*, the judge's alleged arbitrary and autocratic behaviour on the bench. Again, no request by the Minister was made to have the hearing open. Before an inquiry could be initiated, the judge resigned. A further case, not counted in the eight, was the well-known case in which a judge was heard arranging an appointment with a prostitute and was then seen entering her apartment. The Minister of Justice in 1978 requested the Council to take such action "as it deemed proper." It is not clear whether this was a formal request for an inquiry under section 63(1) or a request for the Council to consider the matter under section 63(2). It was probably the latter. In any event, the judge resigned within a month of the Council's receiving the Minister's letter and the file was closed.⁵⁴

There were five cases in which the Council held a formal inquiry on its own initiative under section 63(2). Only the last one, the *Gratton* case in 1994, involved a public inquiry with non-judges on the Inquiry Committee. The other four occurred, as previously stated, before the Council commenced publishing its annual reports in which disciplinary matters are described. Although the *Berger* case in 1981 was not public, the Minister of Justice released the Inquiry Report and the Council's decision, and thus is now very well known.⁵⁵ Both the *Berger* and the *Gratton* cases will be discussed more fully below. In a case in 1976, a judge refused to comply with the terms of a court order made in his own divorce proceedings, and the judge who cited him for contempt brought the matter to the attention of the Council. The Minister of Justice also requested that the Council give the matter "such consideration as the Council may deem appropriate in the circumstances."⁵⁶ A three-person non-public⁵⁷ Inquiry Committee was set up. In the meantime, the judge had a serious accident. Two weeks before the inquiry was to be held, the judge tendered his resignation for medical reasons, which was accepted by the Department of Justice. Another case was brought on by a complaint in 1977 by the judge's chief justice because of a long-standing pattern of delayed judgments which, in spite of protracted and repeated discussions with the chief justice, the judge would not complete. The Inquiry was to be carried out by a single chief justice of another province, but the chief justice was first to give the judge one more opportunity to finish the judgments. The following year, the judgments were produced and shortly thereafter the judge died.⁵⁸ A further formal Inquiry was conducted in private in 1982 at the request of a chief justice involving a judge who allegedly had sexual relations with a family member of a party to a divorce action the judge was hearing. Before the Council could deal with a resolution from the three-person Inquiry Committee recommending removal of the judge, he resigned for health reasons.⁵⁹

The *Gratton* case has already been discussed in some detail. The two other cases that have been the subject of great controversy are the *Berger* and *Marshall* cases.

8. THE BERGER AND MARSHALL AFFAIRS

The "Berger Affair", as it is known, arose in 1981. In November of that year, Mr. Justice Thomas Berger of the trial division of the Supreme Court of British Columbia publicly attacked (in speeches and an op-ed *Globe and Mail* article) two features of the constitutional accord that had just been reached between Prime Minister Trudeau and the premiers of nine provinces (Quebec had not agreed to the accord): the failure to guarantee native rights, and the denial to Quebec of a veto over constitutional change. Shortly after Berger's comments, Prime Minister Trudeau criticized Berger in a television interview for "getting mixed into politics" and expressed the hope that "the judges will do something about it."¹ A judge of the Federal Court of Canada complained to the Canadian Judicial Council and in March, 1982 the full Council appointed an Inquiry Committee to inquire into the charges. The three-person Inquiry Committee² delivered a unanimous report. They concluded their report by stating:³

In our view it was unwise and inappropriate for Justice Berger to embroil himself in a matter of great political controversy in the manner and at the time he did. We are prepared to accept that he had the best interests of Canada in mind when he spoke, but a judge's conscience is not an acceptable excuse for contravening a fundamental rule so important to the existence of a parliamentary democracy and judicial independence. To say that not all judges are cast in the same mold, as does Justice Berger, is only to state the obvious. On every great matter of political concern it would be probable that judges would hold opposing views privately and, if Justice Berger's view is acceptable, it would be possible to have judges speaking out in conflict one with the other because they hold those opposing views from a sense of deep conviction.

We say again if a judge becomes so moved by conscience to speak out on a matter of great importance, on which there are opposing and conflicting political views, then he should not speak with the trappings and from the platform of a judge but rather resign and enter the arena where he, and not the judiciary, becomes not only the exponent of those views but also the target of those who oppose them.

Nevertheless, the Committee did not recommend that steps be taken to remove Justice Berger from office, stating:⁴

So far as the material before us reveals, Justice Berger's impropriety has been an isolated instance. Chief Justice McEachern also advised us in his Submission that Justice Berger has disengaged himself from the constitutional debate as soon as the Chief Justice spoke to him. Nevertheless we view his conduct seriously and are of the view that it would support a recommendation for removal from office. There are, however, in addition to those already noted, special circumstances which make this case unique. As far as we are aware, this is the first time this issue has arisen for determination in Canada. It is certainly the first time the Council has been called on to deal with it. It is possible that Justice Berger, and other judges too, have been under a misapprehension as to the nature of the constraints imposed upon judges. That should not be so in the future. We do not, however, think it would be fair to set standards *ex post facto* to support a recommendation for removal in this case.

The full Judicial Council—at a Special Meeting called for the purpose of considering the Report—did not agree with the Inquiry Committee. They resolved that Justice Berger's actions were indiscreet, but did not constitute a basis for a recommendation that he be removed from office. The full resolution is as follows:⁵

BE IT RESOLVED THAT:

- 1) The Judicial Council is of the opinion that it was an indiscretion on the part of Mr. Justice Berger to express his views as to matters of a political nature, when such matters were in controversy.
- 2) While the Judicial Council is of the opinion that Mr. Justice Berger's actions were indiscreet, they constitute no basis for a recommendation that he be removed from office.
- 3) The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the courts.

This resolution and the report of the Inquiry Committee were submitted to Jean Chrétien, the minister of justice, on May 31, 1982, and were made public by him on June 4, 1982.⁶ A little over a year later, Mr. Justice Berger resigned from the bench.

A number of important issues, apart from the proper limits of extra-judicial speech, were discussed by the Inquiry Committee. The Committee asked three other questions:⁷

- (1) Does the Judicial Council have the power to investigate the extra-judicial conduct of a judge without his consent?
- (2) Must there be a *prima facie* case for removal and nothing less before a formal investigation takes place?
- (3) Is there power in the Judicial Council to reprimand or impose some lesser penalty than to recommend the removal of the judge about whom the complaint has been made?

The Committee obtained an opinion from its counsel, J. J. Robinette, on these questions⁸ and concluded: "We are of the view that the Judicial Council has the power to investigate what is described...as extra-judicial conduct, with or without the consent of the judge concerned, and there does not have to be a *prima facie* case for removal established to the satisfaction of every member before an investigation takes place. Indeed the full facts of a case may not be known or understood *until* an investigation has taken place."⁹ The Committee did not deal with the last point on the power to reprimand.

Robinette had no difficulty with the first two questions. "Extra-judicial conduct may very well affect the acceptable performance of the Judge's judicial duties, or, to use the language of section 41(2)(d) of the Act, extra-judicial conduct may place a Judge in a position incompatible with the due execution of his office."¹⁰ As to first requiring a *prima facie* case, Robinette stated that "there is nothing in Part II of the Judges Act

which suggests that the Council before conducting an inquiry or investigation must first determine whether or not there is a *prima facie* case for removal from office.’’ As to the power to reprimand, however, he had more difficulty, but gave his opinion that Council has no power to reprimand, but can ‘‘express its concluded opinion as to the conduct of the Judge who is the subject of the inquiry.’’¹¹ The Council itself expressed just such an opinion in stating that Berger’s conduct was indiscreet. A later opinion by Michael Goldie (now Mr. Justice Goldie of the B.C. Court of Appeal)¹² extended this view to the Judicial Conduct Committee. Goldie stated: ‘‘In my view neither the Council nor the Committee has the power to admonish or reprimand. I am, however, of the view that the Council and the Committee may indicate disapproval before as well as after the formal inquiry under Section 63.’’¹³

The issue of the limits of extra-judicial speech continues to be debated. The acceptable limit seems to be shifting towards greater freedom to speak out. As Professor Wayne MacKay observed: ‘‘Although it was not so very long ago, it does seem that there would not be the same outcry if a judge were to comment in a similar way today.’’¹⁴ Professor Jeremy Webber’s analysis ends with the conclusion that in the circumstances of Justice Berger’s statement, censure was not warranted. There are limits, however; Webber states:¹⁵

The line is crossed, I believe, when the judge identifies himself closely with a particular faction in the legislature or executive, or when he lobbies consistently and forcefully for a specific political goal—in short, when his activities become partisan in nature. When this occurs, many of the considerations which lead the legislature or the executive to pay insufficient attention to individual interests begin to operate on the judge. If he joins the day-to-day struggle for a particular policy outcome, he may increasingly be tempted to decide matters solely on the basis of whether they conduce to that end, taking insufficient account of other interests involved in the decision. And in order to muster popular support for the desired policy or party, the judge may, in his adjudication of controversial disputes, be eager to appease public opinion.

Professor Peter Russell takes the view in his book on the judiciary that ‘‘Justice Berger’s conduct, especially agreeing to have his remarks on the Quebec veto published in a leading national newspaper at the very time when this was the hottest political issue in the country, was indiscreet.’’¹⁶ ‘‘Nevertheless,’’ Professor Russell goes on to say, ‘‘the decision to apply the formal investigative machinery of the Judicial Council to him, particularly in circumstances when it may appear that such a procedure was adopted under pressure from the prime minister, also showed questionable political judgment.’’ Russell argues, however, that ‘‘there are reasons for insisting on some limit to the off-the-bench political activities of judges in order to maintain two essential characteristics of judicial office: impartiality and independence.’’ As to impartiality, ‘‘if judges openly participate in partisan politics, there is a danger that they will come to be regarded by a politically active citizenry not as third parties, but as aligned with one of the parties appearing before them.’’ As to independence, he argues that some

limit is necessary “to preserve their independence from political attack...Politicians will fight back and attack judges who attack them on their turf.”¹⁷ He points out that the Council’s guideline is relatively narrow and is confined to participation in “controversial political discussion.”¹⁸ An American commentator, Dean Russell Osgood of Cornell Law School, at a recent conference at Cornell run by the Canadian Institute for Advanced Legal Studies, took a somewhat different approach: “My own reaction to the Berger episode is twofold. I do not think a sitting judge should engage in overt political discourse, as Justice Berger allegedly did. On the other hand I see no basis for an investigation or removal of him and the fact that an investigation even occurred strikes me as inconsistent with judicial independence.”¹⁹

There should, in my view, be limits such as suggested by Webber²⁰ and Russell, and even conceded by Justice Sopinka.²¹ But, where the dividing line should be is a matter for the judiciary to work out through a code of conduct, a matter which will be discussed in detail in the next chapter.²²

The Marshall controversy was not about out-of-court statements, but, rather, statements made in the course of a judgment. Donald Marshall, Jr., had been wrongly convicted of murder in Nova Scotia in 1971.²³ After he had spent over 10 years in prison, a reference was directed to the Nova Scotia Court of Appeal by the federal Minister of Justice. The Appeal Court quashed the conviction, but at the conclusion of its unanimous judgment made a number of controversial statements in six oft-quoted paragraphs. The Court stated that Marshall “admittedly committed perjury”; that he was engaged in “planning a robbery” at the time of the killing; and that “Any miscarriage of justice is...more apparent than real.”²⁴

A three-person Royal Commission was appointed in 1986 by the Nova Scotia government to investigate Marshall’s wrongful conviction. Its 1989 Report²⁵ contained “stinging criticism”²⁶ of the Court of Appeal’s final six paragraphs. The following year, the Attorney General of Nova Scotia asked the Canadian Judicial Council to hold an inquiry into whether the five appellate judges should be removed from office. “I am deeply troubled by the Commission’s findings respecting the conduct and decision of these judges of the Appeal Division”, the Attorney General wrote the Council: “It is absolutely essential that Nova Scotians have faith and confidence in the highest court in this Province. If that faith has been shaken by the findings of the Royal Commission, as I believe it has been, it must be restored.”²⁷

The Judicial Council had no choice. It had to conduct a formal Inquiry under section 63(1) of the Judges Act. The Council appointed three of its members, Chief Justices J.H. Laycraft of Alberta, Guy Richard of New Brunswick (then the chair of the Judicial Conduct Committee) and Allan McEachern of British Columbia, who would chair the Committee. The Minister of Justice added two lawyers under s. 63(3) of the Act, Rosalie Abella of Toronto (now a Court of Appeal judge) and Daniel Bellemare of Montreal. The Council directed that the Inquiry be held in public, except when “the public interest and the integrity of the judicial process require that it be held in private.”²⁸ The federal Minister of Justice could have, but did not, order a public

inquiry (the statute does not give the attorney general of a province this power). Two of the five judges who were to be investigated were no longer on the bench: one had retired at age 75 and another had resigned for health reasons. The Council thus had no jurisdiction to deal with them.

In response to a request to clarify the ground for possible dismissal, the Attorney General replied: "The findings of the Royal Commission may not themselves constitute a basis for removing one or more of the judges from office, but this strong language compels a review to determine whether improper motivation may be behind any action of the Court."²⁹ The Royal Commission had tried to examine the five judges, without success. The issue then went to the Supreme Court of Canada, which held that there was no power to compel judges to testify in these circumstances.³⁰ It appears that the Attorney General thought that the Inquiry would be able to examine the judges. He wrote to the Council: "For reasons which counsel for the Attorney General argued vigorously and successfully, the Royal Commission did not have the opportunity to examine any of the judges...Except for the evidence from judges who participated in the Reference, I do not think there is other evidence which I would suggest for consideration."³¹ The Inquiry Committee did not, however, compel the judges to testify and they did not volunteer to do so. No one at the Inquiry, including counsel for Donald Marshall, Jr., argued that "improper motives led to the six impugned paragraphs."³² The Inquiry Committee stated that any questioning³³

...would go specifically into the decisional process of an appellate court, with improper motivation not in issue...It would be entirely inappropriate to submit judges to such interrogation. In our view such questions would strike at the very heart of judicial independence...The rule that judges should speak, or explain themselves, only once, through their judgments, is a wise and salutary one, based on the long experience of the common law. We see no compelling reasons to depart from it in this case.

The Committee appears to have been careful, however, not to tie the hands of future inquiries where improper motive might be a consideration.

We have already quoted the test adopted by the Inquiry Committee: "Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?"³⁴ The Committee stated its "strong disapproval of some of the language" used by the judges.³⁵ "The wrongful conviction and imprisonment of any person constitute a *real* miscarriage of justice," the Inquiry Committee wrote: "it cannot be termed 'more apparent than real'."³⁶ The Committee did not, however, criticize the controversial statements with respect to attempted robbery and perjury, stating: "It is not for us to substitute our own opinion about the findings of credibility made by the Reference Court."³⁷ In particular, the Committee found that "there was evidence before the Court from which [a finding that an attempted robbery had been in progress] could honestly be made."³⁸ Moreover, they were not prepared to fault the judges for

finding that Marshall's "'evasions' had unleashed the tragic consequences he experienced and...that Mr. Marshall would probably not have been convicted if he had told his lawyers, as he did not, where the real murderer could be found."³⁹ Fault was found, however, in the appellate judges' concentration on Marshall's conduct: "by referring exclusively to Mr. Marshall, the six paragraphs give the impression that the Court was ignoring the grossly incorrect conduct of other persons and concentrating on the victim of the tragedy."⁴⁰

The Committee concluded that removal from office was not warranted. Indeed, this was conceded by all counsel in the case:⁴¹

Having found that the five judges in the collegial decision-making capacity were inappropriately harsh in their condemnation of the victim of an injustice they were mandated to correct, we nonetheless accept the submissions of all counsel that their removal from office is not warranted. While their remarks in *obiter* were, in our view, in error, and inappropriate in failing to give recognition to manifest injustice, we do not feel that they are reflective of conduct so destructive that it renders the judges incapable of executing their office impartially and independently with continued public confidence.

The Committee thus gave a little bit to everybody.

Chief Justice McEachern, the chair of the Committee, agreed with the Committee that removal was not warranted, but added extensive comments because he found himself unable to agree with some parts of the majority's analysis. The main difference between McEachern's analysis and the majority's is that on the issues of robbery and perjury, according to McEachern, "there was evidence before the Court that permitted it *reasonably and rationally* to reach the conclusions it did [my emphasis]."⁴² The majority, in contrast, had limited themselves to stating that "there was evidence before the Court from which this finding could *honestly* be made (my emphasis)."⁴³ Whether any member of the majority agreed with Chief Justice McEachern's view of the evidence but decided it was unnecessary or unwise to say so is not known. The appeal court, McEachern C.J. concluded, therefore "made no serious or fundamental error as alleged."⁴⁴ Further, McEachern stressed that if Marshall had told his lawyers the true facts, "it would have strengthened his defence greatly," and he implicitly criticized the Royal Commission who did not "come to grips with Mr. Marshall's failure to tell his lawyer" what he knew.⁴⁵

There was also a difference in emphasis on the question of a judge's right to speak out frankly in judgments. The majority stated:⁴⁶

Judicial independence carries with it not merely the right to tenure during good behaviour, it encompasses, and indeed encourages, a corollary judicial duty to exercise independent thought in judgments free from fear of removal. In consequence of this duty, judges are free to express their views of the case before them in a forthright way.

Chief Justice McEachern stressed again and again in his reasons “the right of judges to say what they really think about the cases they are deciding”;⁴⁷ “we expect our judges to speak directly, even bluntly, so that there will be no misunderstanding of what they mean”⁴⁸; “this freedom of judges to speak their minds has been recognized as one of the hallmarks of judicial independence and one of the prices society pays for the benefits of a judiciary which says what it thinks should be said”⁴⁹; “if judges are expected to speak openly, directly and bluntly about matters that may be of public interest and importance, then we must be very careful indeed before we dilute that principle.”⁵⁰ The majority expressed essentially the same view, but more cautiously. So, in the end, perhaps this different emphasis, which may simply reflect different personalities and experiences,⁵¹ could explain the different manner of treating the main issue of the propriety of the judges’ six paragraphs. There was not, in fact, very much difference between the majority and the minority. As previously stated, the majority did not criticize the Court’s findings of attempted robbery and untruthfulness. And McEachern C.J., like the majority, criticized the Court’s statement that any miscarriage of justice was “more apparent than real,” stating: “There can hardly be any doubt that it was inaccurate and inappropriate to describe the miscarriage of justice suffered by Mr. Marshall as ‘...more apparent than real’.”⁵²

Apart from the substance of the issue, a comment can be made on the process. Professor Wayne MacKay makes an important observation in examining the Berger and Marshall affairs. He states:⁵³

The Canadian Judicial Council has come a long way since its investigation of Justice Thomas Berger. Holding the hearings in public, delegating the inquiry to a committee that included two people outside the judicial community, and establishing fair process for all concerned are laudable improvements over the treatment of Justice Thomas Berger.

9. PROVINCIAL JUDICIAL COUNCILS

The first provincial judicial council in Canada was established in Ontario in 1968,¹ following the recommendations of the McRuer Report.² The discipline process has recently been significantly changed, but it is useful to examine the earlier Ontario legislation because other provinces, to some extent, have based their legislation on it. There is, however, no single pattern in provincial judicial councils. As one writer correctly observed several years ago, there is “a bewildering diversity, with no tendency over time towards convergence in structures and procedures.”³ One can see a tendency in recent times, however, towards greater public participation, greater visibility, greater provincial court involvement, and, as in the federal system, greater separation of the investigation and hearing aspects. To some extent, the different models reflect different philosophies. Some, for example, have more lay representation and are more open than others. But one suspects that the differences are often the result

of the different personalities, particularly in the key judicial figures, in each province at the time the particular Act was introduced.

In this section we will first examine the Ontario legislation and the changes in it prior to 1993. We will then compare legislation in other provinces and territories. Finally, we will look at the new Ontario legislation and other recent legislative models.

The McRuer Report proposed that a body be established with which the Attorney General could consult regarding appointments to the provincial bench.⁴ The majority of the provinces later adopted this aspect of the Judicial Council.⁵ It could also, McRuer stated, be an avenue for complaints against the provincial judiciary:⁶

There should be some body to which members of the Bar and members of the public could present grievances with respect to the conduct of members of the judiciary. If the judicial council recommended in this chapter is appointed, such a body might consider serious complaints and decide whether an investigation under section 3 of the Magistrates Act is warranted.

The procedure at the time for removing provincial court judges (then called magistrates) was by the Cabinet after an inquiry by a Supreme Court of Ontario judge.⁷ McRuer pointed out that the inquiry section had not been invoked since the Act was passed in 1952.⁸

Following the McRuer Report, legislation was passed in Ontario in 1968.⁹ The Judicial Council was composed of the two chief justices of Ontario, the two provincial chief judges, the Treasurer of the Law Society, and not more than two other persons appointed by the Cabinet. As it turned out, it would be ten years before these other two persons were appointed.¹⁰ The legislation did not specify that they be lay persons. The functions of the Council were set out in section 8:

- s.8(1) The functions of the Judicial Council are,
 - (a) at the request of the Minister, to consider the proposed appointment of provincial judges and make a report thereon to the Minister;
 - (b) to receive complaints respecting the misbehaviour of or neglect of duty by judges or the inability of judges to perform their duties; and to hold inquiries in respect thereof.
- (2) An inquiry held by the Judicial Council under clause *b* of subsection 1 shall not be public.
- (3) The Judicial Council, after holding such an inquiry, may recommend to the Lieutenant Governor in Council that an inquiry be held under section 4.

The functioning of the Council remained about the same until the new 1994 legislation. There were some changes, however. A change introduced in 1970 permitted the chair of the Council (the Chief Justice of Ontario) to transmit complaints to one of the chief judges to deal with.¹¹ Another important change in 1984 made removal dependant on a recommendation by the Judicial Council,¹² followed by an inquiry by a judge of the Supreme Court (now the General Division) appointed by the Cabinet.¹³ The recent well-publicized *Hryciuk* case followed this procedure, as have six others to date.¹⁴ Further, instead of the Cabinet having the final decision, removal would now be by the Legislative Assembly.¹⁵ Ontario is still the only jurisdiction to require removal by the Legislative Assembly.¹⁶

All provinces and territories, except Prince Edward Island, subsequently passed legislation adopting the concept of a judicial council. Not only did they have the Ontario model to draw on, but they had the 1971 federal Judges Act to examine.¹⁷ No two councils are exactly alike. It is not my purpose to give a full account of the changing nature of provincial judicial councils. Rather, I will be using differences in legislation to illustrate the range of possibilities that have been adopted.

The next province after Ontario to adopt a judicial council was British Columbia. In the Provincial Court Act of 1969,¹⁸ they adopted much of the language of the 1968 Ontario Act, but with two significant changes. All three judges on the B.C. Council were provincial judges: there were no federally appointed judges on it. Further, unlike in the Ontario Act, in which judges made up the majority of the Council (4 out of 7), the majority of the B.C. Council (4 out of 7) were non-judges.¹⁹ No judge could be removed without an inquiry,²⁰ but it is not clear from the legislation who would conduct the inquiry. In 1981, legislation gave the judge the option of electing whether the inquiry was to be heard by the Council or by a judge of the Supreme Court designated by the Chief Justice of the Supreme Court.²¹ A further change in 1981 increased the non-judicial component of the Council even further, from 4 out of 7 to 6 out of 9.²² B.C. is the only jurisdiction where removal is by the Council (or a Supreme Court judge) rather than by the legislature, Cabinet, or the Court of Appeal. The judge who is the focus of the inquiry may appeal to the Court of Appeal from the finding of the tribunal.²³

Manitoba adopted a model in 1972 that required only one judge on a five-member Council, and that judge, who was to be the chair, was a federally appointed Queen's Bench judge.²⁴ No doubt, the reason the Chief Justice of the province was not a member of the Council was that, as in B.C.,²⁵ an appeal was provided from a disciplinary decision of the Council to the Court of Appeal.²⁶ Manitoba became the only province with no provincially appointed judges on its Council.²⁷ The legislation was subsequently changed to increase the judicial membership to 4 out of 9 members.²⁸ One of the judges, the chair, was to be the Chief Justice of the Queen's Bench. The other three judges were to be provincially appointed judges designated by the Attorney General, one of whom might be the Chief Judge.

The other two prairie provinces introduced legislation creating judicial councils in 1978. The composition of both Saskatchewan's²⁹ and Alberta's³⁰ Council is similar to that in the original Ontario legislation. Judges are in the majority on the Councils and federally appointed judges constitute the majority of judges (2 out of 3 in Saskatchewan and 3 out of 4 in Alberta).³¹ In Alberta, the chair is appointed by the Attorney General and in the early years, at least, has been one of the lay members.³²

The Saskatchewan legislation spelled out in detail the composition of the Inquiry Committee.³³ It would consist of a judge of the Court of Queen's Bench, a judge of the provincial court, and a member of the bar. The Alberta Act, like most other pieces of legislation, simply referred without elaboration to "a committee of the Judicial Council."³⁴ Alberta also specifically gave the Chief Judge of the provincial court certain powers in relation to discipline. The Chief Judge was given the duty to "review any matter regarding the conduct of a judge which comes to his attention in any manner, whether a complaint is made or not, and may...reprimand the judge, take corrective measures, or refer the matter to the Judicial Council."³⁵ In addition, the Judicial Council may refer any complaint to the Chief Judge for inquiry and report to the Judicial Council. A number of other provinces also gave the chief judge strong powers of investigation and screening. British Columbia did so in its 1981 amendments.³⁶

Quebec also introduced a Judicial Council ("Conseil de la magistrature") in 1978. As in British Columbia, no federally appointed judges are on the Council.³⁷ There are 11 judges, all chief or associate chief judges, except for three puisne judges selected by the judges themselves. There are four other members, two recommended by the Barreau du Québec and two lay persons by the Conseil consultatif de la justice.³⁸ Only Quebec and the Northwest Territories³⁹ specified that the "others" must be non-judges and non-lawyers. Five persons from among its members form an Inquiry Committee.⁴⁰ A decision for removal can be made only by the Quebec Court of Appeal.⁴¹ A further section enacted in 1978 provides that the Council, after consultation with the judges, "shall, by regulation adopt a judicial code of ethics."⁴² A short code was subsequently adopted. This will be discussed in a later chapter.

The Quebec Council also has the power to reprimand a judge.⁴³ Ontario, in contrast, did not give the Council any formal power except a recommendation for removal until the 1994 legislation. All other provinces either originally or by subsequent amendments gave the judicial council or the chief judge the power to reprimand. Quebec can also suspend with pay until the inquiry is complete.⁴⁴ Other councils were given the power to suspend without pay, both before the inquiry and as a penalty afterwards.⁴⁵

As previously stated, Prince Edward Island does not have a judicial council. A judge of the Supreme Court is selected by the Cabinet to hold an inquiry. The Inquiry judge can, amongst other things, recommend a reprimand, a short-term suspension, or dismissal, which the Cabinet may implement.⁴⁶ Newfoundland brought in legislation with respect to a Judicial Council in 1974.⁴⁷ The Council was composed of six persons: two federally appointed judges, the Chief Magistrate (now the Chief Judge of

the Provincial Court), a Benchler, and two others nominated by the Minister of Justice. There was, it seems, no provision for breaking a tie. Inquiries were to be conducted by the Council itself. In practice, at least in the earlier stages, one of the "others" was a representative of the provincial Department of Justice.⁴⁸

Nova Scotia did not bring in a Judicial Council until 1980,⁴⁹ and New Brunswick not until 1985.⁵⁰ The Nova Scotia Council consisted of the three chief justices (Court of Appeal, trial division and county court), the Chief Judge of the provincial court, and a representative of the Barristers' Society. It is the only provincial council without lay representation.⁵¹ The Council conducts hearings and may recommend to the Cabinet that a judge be removed from office.⁵² The Council may also "discipline or suspend a judge upon such terms and conditions" as it considers appropriate.⁵³

The New Brunswick legislation enacted in 1985 originally had five members, three of whom were non-judges (a former president of the Barristers' Society and two others appointed by the Cabinet).⁵⁴ The judges were the Chief Justice of the province or another member of the Court of Appeal and the Chief Judge. In 1987, the number of judges was increased to seven and all non-judges were removed.⁵⁵ Finally, in 1990 three non-lawyers were added to the Council.⁵⁶ In the original 1985 legislation, hearings were to be by a Queen's Bench judge, but in 1987 a three-member panel of the Council was to hear the complaint (after first determining that there was sufficient evidence to warrant holding a formal hearing).⁵⁷ Coincidentally with the 1990 change to the composition of the Council, the membership of the panel was amended to include one lay person.⁵⁸

Other issues deserve some discussion. In all provinces and territories, it appears, the Attorney General or the Cabinet has the power to order an inquiry. As to open and closed hearings, there are different approaches. The original Ontario legislation said that an inquiry held by the Judicial Council "shall" not be public.⁵⁹ Hearings by a Supreme Court judge, however, were under the Inquiries Act and were therefore open unless the judge ordered them to be closed in certain narrow circumstances.⁶⁰ A number of the provinces also provided for open inquiries, with power in the Inquiry Tribunal to close the hearing. British Columbia, for example, provides that an inquiry "shall be held in public unless the tribunal considers, in the public interest, that the inquiry or any part of it should be held in private."⁶¹ Still others had the reverse policy: the hearing would be closed unless ordered to be open. For example, New Brunswick provided in its 1987 legislation that inquiries "be held in private unless the judge whose conduct is in question requests that it be held in public or the Judicial Council determines that there are compelling reasons in the public interest that it be held in public."⁶² Both Nova Scotia⁶³ and Alberta⁶⁴ give the Council conducting the hearing no choice: the Council must meet in closed hearings. The Quebec legislation is silent on the issue of publicity, but a recent judicial decision has held that there is no constitutional obligation to hold an open inquiry at the initial stages of the complaints process; it has been established in Quebec, however, that should the complaint require a formal inquiry, the panel must sit in public unless it has compelling reasons not to.⁶⁵

Two further models will be discussed: the new Ontario legislation, parts of which will come into force on September 1, 1995,⁶⁶ and the new Manitoba legislation.⁶⁷ No doubt, by the time this Report is published there will be other models proposed or enacted.⁶⁸

The Ontario legislation has grown enormously in size. In 1968, there were two sections containing 14 subsections; today, there are 14 sections containing approximately 175 subsections. The legislation makes a number of very significant changes to the Ontario procedure. Perhaps the most important are: expanding the Judicial Council by increasing the participation of provincial court judges and decreasing the participation of federally appointed judges; separating the screening, investigation, and hearing aspects of the process; eliminating the single-judge hearings; providing a range of intermediate sanctions short of dismissal; and giving the process greater visibility, with respect to both the availability of the process and the process itself.

The composition of the Ontario Council has been expanded from 8 to 12 persons.⁶⁹ Unlike the earlier legislation, which had judges for 5 of the 8 positions, the new Council is divided equally between judges and non-judges, with the judge who chairs the Council having an extra tie-breaking vote. The non-judges consist of 2 lawyers appointed by the Law Society and 4 remunerated lay persons appointed by the government. Unlike the earlier legislation in which 3 out of the 5 judges were federally appointed, the new legislation has only 1 federally appointed judge out of the 6 judges—the Chief Justice of Ontario, or another Court of Appeal judge designated by him or her. The others are all provincially appointed (2 chief or associate chief judges, a regional senior judge, and 2 puisne judges appointed by the Chief Judge). The Chief Justice of Ontario (or his or her designate) chairs the Council when disciplinary matters are dealt with; otherwise the Council is chaired by the Chief Judge of the Provincial Court. An attempt is made in the Act to obtain a measure of continuity by having fairly long staggered terms for those not there because of their official status.⁷⁰ This therefore reduces the problem noted by one observer who studied provincial councils across Canada that “there is a fairly constant turnover of membership on every council.”⁷¹ The legislation also directs those making the appointments of “the importance of reflecting, in the composition of the Judicial Council as a whole, Ontario’s linguistic duality and the diversity of its population and ensuring overall gender balance.”⁷²

Separation of the screening, investigation, and hearing functions is more easily handled with a larger Council. There are three stages in the process, all conducted by members of the Judicial Council: a two person subcommittee that screens the complaints; a four-person review panel; and a hearing panel of a size determined by the Council. Persons on the screening subcommittee cannot be on the review panel or the hearing panel, and persons on the review panel cannot be on the hearing panel.⁷³ This, of course, reduces the potential size of the hearing panel. Moreover, there are specific rules relating to the hearing panel, such as that half be judges, that it be chaired by the federally appointed judge, and that at least one person be a lay member.⁷⁴

The Ontario Act specifies that the screening subcommittee be composed of a provincial court judge (other than the Chief Judge) and a lay member.⁷⁵ The eligible persons serve on the subcommittee on a rotating basis.⁷⁶ The subcommittee can dismiss the complaint if it "falls outside the Judicial Council's jurisdiction or is frivolous or an abuse of process."⁷⁷ For example, it may be dismissed because it is a complaint about a federal judge or because it is a matter for appeal. This is similar to the functioning of the chair of the federal Judicial Conduct Committee. Most complaints will be dismissed on this basis. One student of judicial councils observed that "the majority (in many provinces, the estimates ran as high as 65% to 70%) really indicate dissatisfaction with the judge's disposition of the case, and the appropriate recourse is to a court of appeal."⁷⁸ The subcommittee can also refer the complaint to the Chief Judge for his or her resolution. Both the judge and the lay member must agree before the complaint is dismissed or referred to the Chief Judge.⁷⁹ If they cannot agree, the complaint goes to the Council. Of course, the subcommittee can send a complaint on to the Council.

The next stage is a review by a four-person review panel.⁸⁰ This panel is to consist of two provincial judges (other than the Chief Judge), a lawyer, and a lay person.⁸¹ One of the judges chairs the review panel and has a tie-breaking second vote.⁸² The panel can dismiss the complaint, refer it to the Chief Judge, or hold a hearing.⁸³

Up to this point, the proceedings have been in private,⁸⁴ although the complainant will have been informed of the Council's decision and in the case of a dismissal have been given brief reasons.⁸⁵ The actual hearing will be open, although there is authority to close the hearing⁸⁶ or order a publication ban⁸⁷ in exceptional circumstances. The legislation leaves it to the Judicial Council to establish rules of procedure for the hearing.⁸⁸

There is a wide range of sanctions open to the hearing committee, apart from a recommendation that the judge be removed from office. The Judicial Council can adopt any combination of the following dispositions: warn the judge; reprimand the judge; order the judge to apologize; order the judge to take specific measures, such as receiving education or treatment; suspend the judge with pay for any period; and suspend the judge without pay for up to thirty days.⁸⁹

A number of provisions are designed to increase knowledge of the availability of the complaint process and the functioning of the process. For example, the Act provides that the Judicial Council shall provide in courthouses and elsewhere information about itself and about how members of the public may obtain assistance in making complaints.⁹⁰ It also has to provide a toll-free number⁹¹ and assistance to members of the public in the preparation of documents for making complaints.⁹² Moreover, as with the Canadian Judicial Council, there is to be an annual report with a summary of its discipline activities, but without identifying the judge or the complainant.⁹³ Further, the Act provides that any provincial judge who is the recipient of an allegation of misconduct about another judge must tell the person about the complaint process and refer the person to the Judicial Council.⁹⁴

One further provision in the Ontario Act that will be discussed in chapter 6, Codes of Conduct, is the provision for establishing "standards of conduct for provincial judges."⁹⁵ The Act is permissive, unlike the Quebec Act, which was mandatory on the issue of a code of conduct.⁹⁶

Manitoba has also recently brought forward legislation that has a number of unique features. Like the Ontario Act and the by-laws of the Canadian Judicial Council, it attempts to separate the investigation from the adjudication stage. The legislation closely follows the recommendations of the Manitoba Law Reform Commission, which had suggested a "modified two-tier system."⁹⁷ The Commission's aim was to balance the positive role of the Chief Judge, as the one in daily contact with the provincial court judges, in handling and resolving complaints, against the need to prevent the perception of private justice or the "old boys'" network.⁹⁸ The result was the recommendation that serious allegations be investigated by a Judicial Inquiry Board and adjudicated by a separate Judicial Council, while minor matters would continue to be dealt with by the Chief Judge.

The new Manitoba legislation has adopted this system and enacts a number of separate steps for the processing of complaints. As in the previous legislation, complaints are first directed to the Chief Judge.⁹⁹ The Chief Judge may also investigate on his or her own initiative, without a complaint.¹⁰⁰ The Chief Judge may dismiss the complaint if of the opinion that there is "no basis" for it, and if "a more appropriate avenue should be pursued by the complainant, the Chief Judge should so advise."¹⁰¹ The Chief Judge can also try to resolve the complaint. Finally, the matter can be referred to "the board for investigation."¹⁰² A complainant dissatisfied with the disposition by the Chief Judge can refer the matter to the Board.¹⁰³

Manitoba's Judicial Inquiry Board will be unique in Canada. It is not composed of members of the Judicial Council.¹⁰⁴ Its function is "to investigate complaints alleging misconduct by judges and to conduct proceedings before the Council when charges of misconduct against judges are laid."¹⁰⁵ The three-person board is chaired by a Queen's Bench judge and includes a lawyer recommended by the Manitoba Branch of the Canadian Bar Association and a lay member appointed by the government.¹⁰⁶

The board investigates complaints that have gone through the Chief Judge, as described above. Operating in private,¹⁰⁷ the Board can try to resolve the complaint, decide that "no further action is required with respect to the complaint", or "formulate a charge of misconduct against the judge, stating the grounds for the charges",¹⁰⁸ and "lay the charge before the council."¹⁰⁹ It is only at this stage that the complaint becomes public.¹¹⁰ The Chief Judge may, if a charge is brought by the Board, suspend the judge without pay.¹¹¹

The Judicial Council is also unique in Canada. It has six members, consisting of three judges, a representative of the Law Society of Manitoba, and two lay persons selected by the government. The unique feature is that the three judges are provincial court judges from elsewhere in Western Canada,¹¹² selected by the chief judge of each of

the three courts. If for some reason a judge from outside the province is not available to serve, the Cabinet, after consultation, can appoint a Queen's Bench or provincial court judge (other than the Chief Judge) from Manitoba.¹¹³ The Board would present the case before the Council.¹¹⁴ The range of sanctions available to the Council is almost identical to that in the Ontario statute, with the exception that an order that the judge take specified measures, such as receiving education or treatment, can be on the basis of a leave of absence without pay.¹¹⁵ As in the previous legislation, it is the Cabinet and not, as in Ontario, the legislature that implements the Council's recommendation for removal.¹¹⁶

As does the Ontario legislation, Manitoba provides for giving information to the public about the complaints process,¹¹⁷ assisting in preparing complaints,¹¹⁸ and providing an annual report.¹¹⁹ Unlike Ontario, Manitoba provides for an appeal to the Manitoba Court of Appeal on a question of law by the judge against whom a decision was made.¹²⁰ The Court of Appeal may "make any decision that in its opinion ought to have been made."¹²¹ The legal construction of the word "misconduct"¹²² would appear to give the Court of Appeal considerable control over the outcome.

10. ENGLAND

There is not a great amount written about discipline in England.¹ Discipline has, for the most part, been handled informally. What Shimon Shetreet stated almost twenty years ago is still true today: "At the present time the informal controls are the main or the sole method of discipline of judges in England."² Nevertheless, as we shall see at the conclusion of this section, there are strong indications that the system may change.

For High Court judges, there is today only one formal method of discipline: an address to both Houses of Parliament.³ Although there were other methods in the past (impeachment, a writ of *scire facias*, or criminal information⁴), "a constitutional practice has been established that judges can be removed only by an address."⁵ Since the Act of Settlement of 1701, only one High Court judge has successfully been removed from office through the joint address procedure, Sir Jonah Barrington,⁶ although there have been a number of unsuccessful attempts to remove others,⁷ and still other judges have been removed by other procedures, such as Lord Chancellor Macclesfield by impeachment in 1725.⁸ Barrington, a judge of the High Court of Admiralty in Ireland, was removed in 1830 for embezzling funds paid into court.⁹

Mr. Justice Strayer, it will be recalled, decided in the *Gratton* case¹⁰ that in Canada Parliament could remove a superior court judge only for lack of good behaviour. Wade and Bradley take the position that "it is theoretically possible for a judge to be dismissed not only for misconduct but for any other reasons which might induce both Houses to pass the necessary address to the Crown," but they go on to state that it is "extremely unlikely that Parliament would be willing to pass an address from any

motive other than to remove a judge who had been guilty of misconduct.”¹¹ As in the *Gratton* case, the English authorities include incapacity as a ground for removal.¹²

The practice is different for circuit judges. They can be dismissed by the Lord Chancellor “on the ground of incapacity or misbehaviour.”¹³ That has happened only once since circuit judges were created in 1971. Judge Bruce Campbell was dismissed after being caught smuggling a large quantity of whisky and cigarettes into Britain in his yacht.¹⁴ “In practice,” one writer states, “a Circuit Judge or Recorder who is prosecuted for a serious offence is more likely to resign well in advance of his conviction—as in the case of the Recorder who in November 1984 was convicted of fraud and theft.”¹⁵

There have been a number of cases in which the Lord Chancellor has publicly rebuked a judge for improper conduct. Robert Stevens notes a case in his book *The Independence of the Judiciary* in which a judge in 1952 who had commented on the moral laxity of a particular district was required to apologize in open court.¹⁶ In another case in 1992, the reprimand was because of “over-familiarity towards female court staff.”¹⁷ In yet another case, in 1993, the Lord Chancellor publicly reprimanded a district judge who had been convicted for the second time of impaired driving. A High Court judge’s homophobic remarks in court in 1978 were “strongly deprecated” by the Lord Chancellor.¹⁸ Lord Chancellor Mackay also gave a public “serious rebuke”¹⁹ to Judge James Pickles, who had held a press conference in a pub next to the courthouse to correct a point which he thought had been inaccurately reported. In the course of the press conference he apparently called the Lord Chief Justice “an ancient dinosaur”, having earlier called the former Lord Chancellor, Lord Hailsham, a “quixotic dictator”.²⁰

It is not surprising, therefore, that Lord Hailsham wanted a better system for controlling misbehaviour.²¹ Citing Canada as a good example, he wanted any act of removal to be “preceded by a quasi-judicial hearing of a disciplinary panel of a judge’s peers.”²² Lord Hailsham’s view is only one indication that the system will change. The Lord Chancellor today has trouble wearing his three hats: the head of the judiciary; a cabinet minister; and the Speaker of the House of Lords. In studying the recent English comments on the Lord Chancellor, I have been struck by the number of attacks on his office by reputable individuals, including a number of judges.²³ Once it is felt that the emperor cannot wear three hats, it is likely that there will be pressure for change. This is particularly true should Labour form the next government. In 1992, for example, Lord Williams of Mostyn, then chairman of the Bar and a Labour peer, proposed a panel of judges, lawyers, and laymen to investigate complaints about the judiciary.²⁴ Writers such as David Pannick, who contributes to *The Times*,²⁵ and Joshua Rozenberg, the B.B.C.’s legal correspondent,²⁶ favour a more formal system of discipline.

Perhaps the most telling indication that some change in the form of discipline is in the wind is the 1992 report by the influential group Justice entitled *The Judiciary in England and Wales*.²⁷ The distinguished committee, chaired by Robert Stevens, had

on it the immediate past chair of the Bar Council, a past president of the Law Society, a former circuit judge, and a former senior civil servant in the Lord Chancellor's Department. They stated:²⁸

There is little structure designed to maintain standards or to provide sanction for the behaviour of the judiciary. There are at least two reasons for this. First has been a reluctance to appear to interfere with the independence of the judges; and second has been the difficulty of providing such machinery. Thus performance and discipline have primarily been a matter for the Lord Chancellor and the senior judiciary.

The Justice committee concluded that "something more than the current informal arrangements is needed"²⁹ and proposed a Judicial Commission which would have as a subcommittee a Judicial Standards Committee. The Justice committee described the work of the Judicial Standards Committee:³⁰

We envisage the creation of a Judicial Standards Committee as a sub-committee of the Judicial Commission responsible for all judges, permanent or term, full or part-time. Its function would be to provide an independent mechanism for reviewing the professional conduct of judges. The Sub-Committee would have its own secretariat but individual members of the Commission would supervise the consideration of complaints on a rota basis. For this purpose it might well be appropriate if there were two rota members: one legal, one lay.

The rota members concept resembles the new Ontario scheme, and the use of the Judicial Standards Committee as an advocate resembles the new Manitoba scheme.

The composition of the Judicial Commission has been and will be controversial. The judiciary will not be happy with a body composed of thirteen members, seven of whom are lay persons. Moreover, of the six professionally qualified persons, the Justice committee states that "no more than two of the six lawyers should be judges."³¹ The Commission members would serve in turn as rota members hearing complaints and also on a committee charged with the development of both standards and sanctions, which would be subject to the approval of the Lord Chancellor.³² It remains to be seen, however, how far England will go in this direction.

It should be noted as an addendum to this section that a very recent (February, 1995) Labour Party consultation paper proposes that a Labour government would create an independent "Judicial Appointment and Training Commission."³³ The consultation paper states:³⁴

The Commission will also have responsibility for over-seeing judicial training (taking over the functions of the Judicial Studies Board), handling complaints about judicial conduct, judicial discipline and for monitoring the careers of existing and aspirant judges. The Commission itself will be headed by a chair

with a distinguished legal background (possibly the Lord Chancellor), assisted by two vice-chairs who would be eminent laypersons. Other members of the Commission would be drawn from a wide range of both legal and non-legal backgrounds. The chair and members of the Commission would be appointed by the Monarch on the advice of the Prime Minister.

11. THE UNITED STATES: FEDERAL SYSTEM

Unlike in England, where there is very little published material on judicial discipline, in the United States the quantity of even recently published books and articles is enormous.¹ In this section, we examine the federal system and in the next, the state system.

For Canadian federally appointed judges, the U.S. federal system is the one that provides the most appropriate comparative model. The comparison between Canadian and American federally appointed judges is appropriate in a number of respects. For both, there is great prestige in the office; the qualifications, tenure, and remuneration are not dissimilar; and the number of judges involved happens to be about the same in each country. In 1993, there were about 850 life-tenured federal judgeships in the United States, plus “senior status” judges.² In Canada, there were about 780 federally appointed judges, plus about 170 supernumerary judges.³

In August, 1993, a blue-ribbon committee produced an excellent report on judicial discipline and removal in the U.S. federal system.⁴ The thirteen-member Commission, established by statute, was made up of three persons appointed by the President, three by the Chief Justice, three by the Speaker of the House, three by the President of the Senate, and a thirteenth member appointed by the Conference of the Chief Justices of the States. The *Report of the National Commission on Discipline and Removal*, along with the two thick volumes of background papers,⁵ plus a volume containing a transcript of public hearings, have been invaluable to me in gaining an understanding of the discipline process in the federal system.

The Commission was established because of concern that the impeachment process was taking too much of Congress’ time. In the second half of the 1980s, three judges were impeached. The previous impeachment had been in 1936 and, including the recent three, there have only been seven since the nation was established.⁶ A number of senators and representatives wanted to find an alternative to the time-consuming impeachment process.⁷ There was also concern because of the outrage felt by the public when convicted judges sitting in jail awaiting impeachment were drawing full salaries.⁸ The Commission concluded that a constitutional amendment would be required if an alternative to impeachment were to be brought in. Such an amendment would be needed to suspend or otherwise diminish a federal judge’s compensation while in office.⁹

Apart from the impeachment process, there is power in the judiciary itself to exercise a measure of discipline through what is simply called "the 1980 Act" (formally the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980).¹⁰ For both the impeachment process and the 1980 Act, the Commission felt that modest improvements were better than radical reforms.¹¹ "Existing arrangements are working reasonably well", the Commission observed, but added: "improvements are both possible and desirable."¹² The United States Supreme Court, it should be added, is not subject to the Act or the Code of Conduct for United States judges, although the Court uses the Code for guidance. The National Commission gently recommends, however, that the Court "may wish to consider the adoption of policies and procedures for the filing and disposition of complaints alleging misconduct against Justices of the Supreme Court."¹³

Let us first look at the impeachment process. Article II of the Constitution provides for the same process for the removal of judges as for the removal of the President: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹⁴ Under Article I of the Constitution, it is the House of Representatives that first determines that impeachment is appropriate and then acts as the prosecutor. It is the Senate that tries the impeachment.¹⁵ A vote on oath or affirmation of two-thirds of the members of the Senate who are present is necessary for impeachment.¹⁶

The House has conducted a total of 58 impeachment investigations of federal judges. The Senate has conducted 11 impeachment trials of federal judges (out of a total of only 14 impeachment trials of all officials including judges).¹⁷ As a result of these trials, seven federal judges were convicted and removed from office (including three in the 1980s).¹⁸ The last three were convicted of offences committed while in office: Judge Claiborne for tax evasion; Judge Hastings for conspiracy to solicit a bribe; and Judge Nixon for giving false statements to a grand jury.¹⁹ Before 1983, no sitting judge had ever been prosecuted and convicted of a crime committed while in office.²⁰ The threat of a criminal prosecution combined with a House investigation had, however, produced a number of resignations.²¹

The Senate proceedings in earlier periods were conducted on the Senate floor and involved the entire Senate.²² But in the latest three cases the Senate designated a trial committee to hear the evidence and report to the full Senate, without actually making recommendations on the accused's guilt or innocence. The Senate would then hear counsel for the accused and the accused before voting.²³ This procedure was the result of a very long Senate impeachment hearing in 1933, which took 76 of the first 100 days of Franklin Roosevelt's first administration.²⁴ This procedure was challenged in the Judge Walter Nixon impeachment, but the United States Supreme Court held in 1993 that they would not review the Senate's procedures as long as two-thirds of the Senate voted to impeach.²⁵

The Commission did not recommend that any major change be made in the impeachment procedure, apart from such matters as greater use of issue estoppel (or as the Americans call it, issue preclusion). Issue estoppel should apply, they recommended, “except in unusual circumstances.”²⁶ The Commission was reluctant to turn the entire decision over to another tribunal to determine the facts and whether the conduct warrants removal from office.²⁷ Moreover, Congress is a check on improper prosecution and targeting of judges.²⁸ The Commission was also sensitive to the fact that their recommendations on impeachment would also apply to the President and Vice-President.²⁹ They concluded — to cite one more recommendation — that although it would be unconstitutional to suspend the pay of a judge convicted of a felony, legislation should be enacted to prevent a judge so convicted from hearing or deciding cases unless the circuit decides otherwise.³⁰

The 1980 Act was also carefully considered by the Commission. This Act, first enacted in 1980, broadly resembles the earlier 1971 Canadian Judges Act. The 1980 Act gives the federal judiciary a strong measure of control over undesirable conduct. As the Commission stated: “Congress...sought to provide a credible formal mechanism within the judiciary as a supplement to the impeachment process. The hope was expressed that, by confirming the judiciary’s power to take formal action, Congress would also enhance informal approaches to problems of misconduct and disability.”³¹

The Act was passed in part because the power of the circuits to control undesirable judicial conduct was not clear.³² Moreover, the Act was part of the American post-Watergate search for greater accountability by all parts of government.³³ The Act permits any person to file a complaint alleging that a federal judge (including a bankruptcy or magistrate judge) “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts...or is unable to discharge all the duties of office by reason of mental or physical disability.”³⁴ The effect of the latter part of the section has already been commented on in an earlier section of this Report.³⁵ It permits a circuit to declare that a judge of that circuit is disabled and that the chief judge need not assign cases to the judge. The President of the United States is then entitled to appoint another judge to the court. A very significant amendment was made to the Act in 1990, whereby the chief judge can “identify a complaint” on the basis of available information, without requiring the formal filing of a complaint.³⁶

There is no direct link-up with the codes of conduct which have been adopted by each circuit and which will be discussed in another part of this Report. As the National Commission states: “The Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable.”³⁷

In brief, the discipline system works as follows. The complaint first goes to the chief judge of the circuit. (There are 13 circuits.)³⁸ The chief judge “may dismiss it, by written order stating reasons, if it is not in conformity with the Act, is directly related to the merits of a decision or procedural ruling, or is frivolous.”³⁹ One clear difference between the U.S. and Canadian federal procedures is that in the U.S. the

vetting of the complaint is by the chief judge of the circuit, whereas in Canada it is by the chair of the Canadian Judicial Council's Judicial Conduct Committee.

The number of official complaints is substantially higher in the United States than in Canada. From 1980 through 1991, there were 2,405 complaints filed in the U.S. federal system, whereas from 1972 through 1991 there were about 680 complaints in Canada with respect to federally appointed judges. No doubt, one of the reasons there are fewer formal complaints in Canada is that in Canada letters or other communications to the chief justice or passed on to the chief justice are not always sent on to the Canadian Judicial Council. Most of these would be disposed of by the chief justice informally. The U.S. figures are in fact much lower than was originally estimated when the scheme was introduced in 1980. At that time, the congressional budget office estimated that there might be 2,300 complaints each year.⁴⁰ The National Commission thought the present number of complaints were low because of widespread ignorance of the Act and recommended that both the bar and the federal judiciary increase awareness of and education about the Act.⁴¹ The Commission also noted the widespread reluctance among members of the bar to file a complaint and recommended that each council have a committee, broadly representative of the bar and that may include lay representatives, to assist the chief judge.⁴²

In both Canada and the United States, the original screening, whether by the chief judge of the circuit in the U.S. or by the chair of the Judicial Conduct Committee in Canada, results in the dismissal of about 95% of the cases.⁴³ The single most common ground for dismissal in both jurisdictions is that the complaint is related to the merits of the case.

As previously stated, the chief judge can dismiss the complaint "if it is not in conformity with the Act, is directly related to the merits of a decision or procedural ruling, or is frivolous." The Act also authorizes a chief judge to end the proceedings if "appropriate corrective action has been taken."⁴⁴ About 3% of complaints filed — and in some circuits over 6% — are resolved on this basis.⁴⁵ Researchers for the National Commission gave the following examples of corrective action:⁴⁶

For example, the complaints dealing with delay generally produced a decision or a specific pledge to issue a decision immediately; the complaints dealing with demeanor generated either a written apology contained in the judge's response to the complaint, an apology to the complainant on the record, or an apology stated clearly to the chief judge and communicated to the complainant via the chief judge's order. Other orders specified the behavior to be followed, such as avoiding expression of specific partisan political views, clarifying a recusal policy, or abstaining from alcohol.

"Testimony before the Commission and interviews with judges," the National Commission stated, "indicate that, for many of them, the opportunity to resolve a complaint and conclude a proceeding on the basis of corrective action is a central feature of the Act."⁴⁷

If the chief judge does not dismiss the complaint or conclude it because of corrective action, the chief judge must appoint a special committee to investigate the complaint and file a written report with the circuit judicial council containing its finding and recommendations.⁴⁸ The council may conduct additional investigation and is required to take “such action as is appropriate to assure the effective and expeditious administration of the business of the courts.”⁴⁹ Up to the end of 1991, only 40 complaints resulted in the appointment of a special committee.⁵⁰ Twenty-seven of the complaints heard by special committees were dismissed by the circuit council after receiving the special committee reports. A number resulted in voluntary retirements and one led to impeachment and removal. Eight were concluded by a reprimand: three of the eight were public reprimands and five were private.⁵¹ A reprimand is the only sanction available to the council short of recommending impeachment, and, as can be seen, it is very rarely used.⁵²

The special committee consists of the chief judge and an equal number of circuit and district judges.⁵³ These committees tend to be *ad hoc* rather than standing committees.⁵⁴ Some circuits, as in Canada, engage an outside lawyer-investigator to investigate the allegations of the complaint on the committee’s behalf.⁵⁵ If the chief judge does not send a complaint to a special committee (or if a judge is unhappy with the corrective action taken), a petition can be made to the judicial council for review.⁵⁶ There had been, up to the end of 1991, about 650 petitions for review out of about 2,400 complaints. The study conducted for the National Commission found only two cases—out of a sample of 469 complaints—in which a petition for review was granted by a judicial council.⁵⁷ The investigators were unsure about the reason for the lack of success, stating: “It remains an open question whether the infrequency of judicial council action on review reflects councils’ inattentiveness, or a paucity of meritorious petitions for review, or both.”⁵⁸ They suggested that it would be preferable to have a standing or rotating three-judge panel review the dismissal orders, but the National Commission made no recommendation on the issue.⁵⁹

An outsider wonders whether the system at present is not weighted too heavily in favour of upholding the chief judge’s decision. The petition is to the judicial council of the circuit which the chief judge chairs for other business, but not for these petitions. There would be less of a potential conflict if it was to a panel of judges from other circuits. There is, however, the possibility of a further petition for review to a five-judge committee of the Judicial Conference (consisting of representatives of all the circuits) from a council’s decision following a special committee. But, as of the end of 1991, there were only nine such instances of further review by the Conference, and in only two cases did the Conference disturb the council’s decision.⁶⁰

The Act gives the chief judge authority to deal with problems informally. As the Illustrative Rules for the circuits state: “The law’s purpose is essentially forward-looking and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts.”⁶¹ The judge is normally willing to cooperate with the chief judge in resolving the dispute in order to avoid a hearing by a special committee. As Barr and Willging, two key background

investigators for the National Commission, state: "Informal activity operates in the shadow of the Act, which looms in the background as a disfavored but imposing alternative."⁶² "You get the right result," one chief judge stated, "without unnecessarily humiliating or degrading anyone."⁶³ The author of another one of the Commission's background studies stated: "With enactment of the formal disciplining process in 1980, and a 1990 amendment authorizing the chief judge to identify complaints [that is, without a formal complaint], the incentives for recalcitrant judges to take advantage of informal opportunities to modify their behaviour became even greater."⁶⁴ The author then quotes the testimony given by a former chief judge to the National Commission:⁶⁵

The complaint procedure...changed the relationship of the chief judge to the other judges within his circuit. Until 372(c) came along, a judge who said to a judge within his circuit, "Look, let me talk to you candidly. Are you having a little problem with the bottle?" The reply probably would have been, "Mind your own business." But, you see, the procedure, particularly with the 1990 Amendment, gives the chief judge an opportunity to be in communication, to investigate, and to act...This gives the chief judge an opportunity for informal relationships about a whole host of matters. And any sensitive and able chief judge, I think, will avail himself of this.

The Act seems to be working well. A major background study examined the complaints in eight circuits and found only 12 problem dispositions among the 469 complaints they sampled. Barr and Willging, the authors of the study, state: "One of the problem dispositions involved a possibly precipitous dismissal for frivolousness, without inquiry; six involved possibly erroneous dismissals for merits-relatedness; and five involved possibly erroneous dismissals on the ground that the conduct alleged did not constitute misconduct under the Act."⁶⁶

Again and again, in their report, the National Commission stressed the importance of this early informal resolution of complaints:

The most important benefit of the 1980 Act [is] the impetus it has given to informal resolutions of problems of judicial misconduct and disability.⁶⁷

Although the 1980 Act established a formal mechanism for filing complaints, perhaps its major benefit has been facilitation of informal adjustments of problems of judicial misconduct or disability.⁶⁸

...a major benefit of the Act's formal process has been to enhance the attractiveness of informal resolutions. The continuing success of informal approaches is due in large part to the system of decentralized self-regulation that long antedated but was fortified by the Act.⁶⁹

...perhaps the greatest benefit of the 1980 Act has been the support it has provided, and the impetus it has given, to informal approaches to problems of federal judicial misconduct and disability.⁷⁰

I stress this aspect of the American system because in the final part of this chapter of the Report I will argue that the Canadian federal system *officially* overlooks to too great an extent the informal resolution of complaints. Informal resolution of complaints is the most distinctive feature of the U.S. federal system. The other and concomitant feature is the decentralized operation of the system through the 13 circuits themselves.

The circuits also have the power—to a considerable extent—to adopt their own rules of procedure with respect to complaints. In fact, there is considerable uniformity among council rules because of the Illustrative Rules, first produced by the Conference of Circuit Chief Judges, working with the Judicial Conference, and revised in 1991 by the Judicial Conference.⁷¹ As a result of the National Commission recommendations, there will be greater uniformity amongst the circuits, particularly with respect to the visibility of the process.⁷²

Visibility is provided in a number of ways. Congress provided in the 1980 legislation that council orders implementing action following the report of a special committee be available to the public and, unless contrary to the interests of justice, be accompanied by written reasons. The Director of the Administrative Office of the U.S. Courts is also required to produce an annual report outlining in summary form the number of complaints filed, indicating their general nature and any action taken.⁷³ The Illustrative Rules provide for public availability of the chief judges' dismissal orders, sanitized to preserve confidentiality. Because the vast majority of complaints are dealt with in this way, this is an important feature of the Act. But there was no uniformity amongst the circuits on this crucial issue. The dismissal orders did not always contain reasons for dismissal and did not contain a sanitized complaint.⁷⁴ Moreover, not all councils made orders of dismissal public.⁷⁵ The National Commission therefore recommended that there be uniformity and that there be public availability of the chief judges' orders of dismissal and any accompanying memoranda.⁷⁶ They also recommended that a chief judge who dismisses a complaint should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition."⁷⁷ They left it to the councils and the Judicial Conference to adopt the recommendations, failing which the Act should be amended. The remaining hold-out circuits subsequently changed their procedures, and there is now uniformity in the federal system.⁷⁸ The issue of visibility was very important to the National Commission. They end their report with the statement: "The judiciary thus has a direct institutional interest in a system of self-regulation that is not only effective but perceived to be effective."⁷⁹

It will be noted that the Commission did not recommend lay participation directly in the process, although, as previously stated, a committee of lawyers that may include lay representatives was suggested for each circuit.⁸⁰ The public availability of the disposition of all complaints was their method of gaining visibility.

The 1980 Act, they concluded, is “working reasonably well”⁸¹ and would work better with their proposed changes. Moreover, studies conducted for the Commission show that the Act does not interfere with judicial independence. A survey of chief judges showed that none of those examined felt that the Act posed a threat to the independence of the judiciary as a whole or to any specific judge in any proceedings they had encountered. And a survey of federal puisne judges showed that 98% (294 out of 301) felt that discipline proceedings did not interfere with their judicial independence.⁸²

The Commission also examined the various state systems but felt that the adoption of one of the state models was “neither necessary nor desirable”⁸³. It is to the state systems that we now turn.

12. STATE SYSTEMS

California was the first state to bring in a commission on judicial performance. In 1960, a constitutional amendment was enacted in California to establish what was originally called the Commission on Judicial Qualifications.¹ Since that date, commissions have been established in every state, the last two being Arkansas in 1988 and Washington in 1989.² This section relies heavily on a detailed study in 1990 by Judith Rosenbaum for the American Judicature Society³ as well as on a background study by Timothy Murphy for the 1993 National Commission on Judicial Discipline and Removal.⁴

The existence of commissions has increased the disciplining of judges. The New York Commission, for example, was established in 1977.⁵ From 1979 until 1985, over 200 judges were publicly disciplined, 60 of whom were removed from office. In the 100 years before the commission’s creation, only 30 New York judges were publicly disciplined, 15 censured and 15 removed.⁶ New York state, with its 3,500 elected judges in its unified court system, has the biggest workload in the United States. It receives about 1,500 complaints a year⁷ and has a staff of about 35 full-time employees,⁸ with a budget of over two million dollars.⁹

There is great diversity amongst the various state commissions. The range of differences is well described in Rosenbaum’s study. The state systems are also quite different from the U.S. federal system. One important contrast with the federal system is that there is significant lawyer and lay participation in the process in the state systems, but virtually none in the federal system. Moreover, almost all the state systems permit an ultimate appeal to the state supreme court. In the federal system, neither the Supreme Court of the United States nor the circuit courts of appeal play a direct role in the proceedings. Further, the vast majority of states permit removal of a judge by the state supreme courts or a similar body, in addition to impeachment, whereas impeachment is the only technique for removal in the federal system.¹⁰ Another very

significant difference is that there is little official role for chief judges or administrative judges to vet or resolve issues. We saw in the last section that in the federal system the circuit chief judge plays a crucial role vetting and resolving complaints.

The U.S. National Commission points out that “state constitutions tend to balance judicial independence and judicial accountability differently for state courts than the U.S. Constitution does for the federal judiciary.”¹¹ “In general,” they observe, “state judges have somewhat more public accountability but somewhat less judicial independence than federal judges have.”¹² One reason for the difference, the Commission points out, is that unlike the federal system’s life tenure, almost all states establish a fixed term of years for judges. The Commission does not go on to speculate about the significance of this difference, but perhaps it is the concern that a state judiciary which is for the most part elected and thus more involved in politics, with all its financial and other debts and without the assurance of a secure financial arrangement for the future, and is not carefully vetted in advance of selection, requires greater accountability than is required of judges in the federal system.

For our purposes, it would be useful to examine the seven state systems looked at in a background study done for the National Commission.¹³ Timothy Murphy, a researcher with the National Center for State Courts, selected New York, Pennsylvania, Illinois, Michigan, California, Ohio, and Washington for study. Together, these states account for about 40 percent of the population of the United States. Information on these states can also be found in Rosenbaum’s study¹⁴ and various documents produced by the American Judicature Society.¹⁵ The American Judicature Society collects data on complaints and their disposition for all American states. Current data are set out in a recent part of the *Judicial Conduct Reporter*.¹⁶ In the accompanying chart, I have set out the relevant data on the above seven selected states, drawn from the *Reporter*.

The American literature often describes the commissions as one-tier or two-tier systems. So, for example, Ohio and Illinois would be described as having two-tier systems because there are two separate tribunals in each jurisdiction. Illinois, for example, has a nine-person Judicial Inquiry Board and a five-judge Courts Commission.¹⁷ I do not, however, find that the “tier” terminology is particularly helpful. Illinois has simply substituted a five-judge Courts Commission for its State Supreme Court.¹⁸ So its system really does not differ from, say, the Pennsylvania system, which has a nine-person Judicial Inquiry and Review Board¹⁹ followed by an appeal to the State Supreme Court that involves a *de novo* review.²⁰ Yet Pennsylvania’s would be described as a one-tier system. The real issue should be whether members of the commission involved in the investigation stage are removed from the hearing stage. This is a technique used in the new Ontario and Manitoba legislation and recommended in the American Bar Association’s new Model Rules for Judicial Disciplinary Enforcement, which will be looked at later in this section.

1992 DATA FOR SELECTED STATES

	Complaints pending at beginning of period	Complaints received	Complaints dismissed without formal adjudication	Dismissed without investigation	Dismissed after investigation	Informal action before formal charge	% that were dismissed	Judge vacated office, resigned or voluntarily retired before formal adjudication	Case dismissed after the formal hearing	Private censure	Public censure	Judge removed	Pending at the end of period
California	165	966	920	674	246	40	94	1	0	11	3	0	58
Illinois	126	166	166	51	115	22	97	not available	2	not applicable	0	0	20
Michigan	156	684	611	not available	not available	not available	100	not available	not available	42	9	0	129
New York	181	1,452	1,387	1,272	115	46	93	70	0	not applicable	16	2	141
Ohio	37	448	463	not available	not available	0	100	0	0	not applicable	0	0	22
Pennsylvania	166	212	277	0	277	10	97	0	2	10	1	1	91
Washington	43	233	164	0	164	not applicable	95	not applicable	0	not applicable	7	0	103

The composition of the seven commissions varies widely in numbers, in the inclusion of lawyers and lay members, and, perhaps most importantly, in the number of judges in relation to others on the commission. The California, Michigan, and Pennsylvania commissions each have five judges on of a nine-member commission.²¹ In contrast, the Washington commission contains only three judges out of eleven members, Illinois has two out of nine, New York has four out of eleven, and Ohio has seven out of twenty eight. It is interesting to note that seventeen members of the Ohio Commission are lawyers.²²

The accompanying chart sets out the composition of the seven jurisdictions.²³ It illustrates the considerable diversity amongst the jurisdictions. This diversity carries through in other areas as well. So, for example, if the case goes forward for a full hearing, the composition of the tribunal hearing the facts will vary. In New York, there is almost always one fact-finder.²⁴ In other states, the full commission hears the case.²⁵ In Pennsylvania, a subcommittee of the commission holds the hearing.²⁶ There are also differences in the quantum of proof required. New York and Michigan permit a finding on a preponderance of evidence,²⁷ whereas California and Washington use a “clear and convincing” test.²⁸ One state, New Jersey, requires “proof beyond a reasonable doubt”.²⁹

Some of the diversity will be eliminated to the extent that states accept the American Bar Association’s recently adopted Model Rules for Judicial Disciplinary Enforcement.³⁰ There was an earlier set of model rules developed in 1979 by the A.B.A.’s Standing Committee on Professional Discipline and the Judicial Administration Division, but it was not adopted by the A.B.A.³¹ In 1990, the A.B.A. significantly revised its Model Code of Judicial Conduct, and in the same year it started work on revising the Model Rules for Judicial Disciplinary Enforcement. These were adopted by the A.B.A. in 1994.³² The stated goals were to assure conformity with the new A.B.A. Model Code of Judicial Conduct; ensure prompt and fair discipline for judges; enhance public confidence in the judiciary and in the judicial disciplinary system; ensure the protection of the public and the judiciary; protect the independence of the judiciary; and establish a model for states to use as a resource to establish improved judicial discipline systems.³³

The A.B.A. Report explaining the new rules anticipated resistance to such a comprehensive overhaul of the functions of the judicial disciplinary commissions.³⁴ No doubt there will be resistance. Nevertheless, it is likely that the Model Rules will slowly have an impact throughout the states, just as the Code of Judicial Conduct has had.

In the Model Rules, the Commission is to be composed of an equal number of judges, lawyers, and lay persons.³⁵ No number is firmly fixed, but 12 is suggested as a model.

The key rule requires a separation of the investigative function from the adjudicative process. The Report states that “Judges and lawyers have been critical of existing

COMMISSION MEMBERSHIP

STATE/ COMMISSION	TOTAL MEMBERS	MEMBERSHIP COMPOSITION	SELECTION METHOD	TERM (YEARS)	SUCCESSIVE TERMS
CALIFORNIA Commission on Judicial Performance	9	5 judges 2 lawyers 2 lay members	appointed by Supreme Court appointed by state bar appointed by governor	4	2
ILLINOIS Judicial Inquiry Board	9	2 judges 3 lawyers 4 lay members	appointed by Supreme Court appointed by governor appointed by governor	4	2
Illinois Courts Commission	5	5 judges	3 selected by Supreme Court 2 selected by appellate court	No provision	
MICHIGAN Judicial Tenure Commission	9	5 judges 2 lawyers 2 lay members	* see below elected by members of state bar appointed by governor	3	No provision
NEW YORK State Commission on Judicial Conduct	11	4 judges 1 lawyer 2 lay members 4 additional members who are not judges or retired judges	1 appointed by the governor 3 appointed by the chief judge of court of appeals appointed by the governor appointed by the governor 1 appointed by temporary president of senate 1 appointed by minority leader of senate 1 appointed by speaker of assembly 1 appointed by minority leader of assembly	4	No provision
OHIO Board of Commissioners on Grievance and Discipline	28	17 lawyers 7 judges 4 lay members	Each of 7 Supreme Court justices chooses 2 lawyers and 1 judge; all public members and remaining 3 lawyers chosen by majority vote of Supreme Court	3	2
Commission of Judges	5	5 judges	appointed by Supreme Court	Ad hoc	
PENNSYLVANIA Judicial Inquiry and Review Board	9	5 judges 2 lawyers 2 lay members	appointed by Supreme Court appointed by governor appointed by governor	4	1, but may be reappointed after interval of 1 year
WASHINGTON Commission on Judicial Conduct	11	3 judges 2 lawyers 6 lay members	1 elected by and from court of appeals 1 elected by and from superior court 1 elected by and from district court selected from state bar appointed by governor	4	No provision

* Michigan - 5 judges - 1 elected by appellate judges
1 elected by circuit judges
1 elected by probate judges
1 elected by courts of limited jurisdiction judges
1 elected by state bar

procedures, especially those that appear to combine investigative and adjudicative functions in a single body."³⁶ They therefore conclude: "A commission member who participates in the investigation should not participate in the adjudicative process and vice versa. The counsel who investigates a complaint and presents evidence at the formal hearing should not assist the commission in deciding whether the prosecuting lawyer sustained his or her burden of proof at the hearing."³⁷ To achieve this separation, the 12-person commission would be divided into two rotating panels, an investigative panel of three members (a judge, lawyer, and lay person) and a hearing panel of nine persons. No person would, of course, sit on an investigative and adjudicative panel for the same proceeding.³⁸ Further, a disciplinary counsel should work with the investigative panel and a separate commission counsel would advise the adjudicative panel.³⁹ Noting a lack of uniformity in the states,⁴⁰ a number of model rules respecting the process are set out. One rule, for example, provides that a complaint can come from any source, even an anonymous source.⁴¹ Another rule provides that prior to the filing of formal charges all proceedings are to be confidential, but after a formal charge the proceedings are to be public, except for incapacity proceedings.⁴² The Report noted the "overly secret" nature in some states. Only 27 states, they note, provide public hearings in formal proceedings.⁴³

The Model Rules permit the proceedings to be dealt with initially by a hearing office or a subpanel, with the findings submitted to the hearing panel.⁴⁴ The standard of proof required is to be "clear and convincing evidence."⁴⁵ Review of a commission decision is to be by the highest court in the state,⁴⁶ but with a special panel of trial and intermediate appellate judges if the complaint involves a member of the highest court.⁴⁷ The highest court can remove or suspend the judge, give a public reprimand, or order participation in therapy, counselling, or recovery programs. The investigative panel can, with the consent of the judge, give a private admonition.⁴⁸

The Model Rules, it will be noted, bear some similarity to the separation of functions in the Canadian Judicial Council's Judicial Conduct by-laws and in the new Ontario and Manitoba procedures. They provide a set of procedures which in the long run will probably influence the development of procedures for state commissions.

13. CONCLUSION

The previous sections show a wide array of procedures for dealing with undesirable judicial conduct. In this section, we will examine some general concepts and their specific applications to Canada.

One point that it is worth stressing at the outset is that there is an obvious connection between the selection process and the subsequent necessity for disciplining judges. As the recently published Report by the U.S. National Commission on Judicial Discipline

and Removal observed: "If the appointment process operated perfectly to select only the most highly qualified and honest judges, the need for disciplinary action would be significantly reduced if not eliminated."¹ This perhaps overstates the connection, but that there is a connection is obvious. The appointment process will be discussed in detail in a later chapter.

There is a tension between judicial accountability and judicial independence. Judges should be accountable for their judicial and extra-judicial conduct. The public has to have confidence in the judicial system and to feel satisfied, as Justice Minister Allan Rock stated in a speech to the judges in August, 1994 "that complaints of misconduct are evaluated objectively and disposed of fairly."² At the same time, accountability could have an inhibiting or, as some would say, chilling effect on their actions. When we are talking about judicial decisions being scrutinized by appeal courts, we are generally not worried about curtailing a judge's freedom of action. That is the purpose of an appeal court: to correct errors by trial judges or in the case of the Supreme Court of Canada to correct errors by appeal courts. Similarly, if actions of a judicial council deter rude, insensitive, sexist, or racist comments, that is obviously desirable. The danger is, however, that a statement in court that is relevant to fact-finding or sentencing or other decisions will be the subject of a complaint and will cause judges to tailor their rulings to avoid the consequences of a complaint. It is therefore necessary to devise systems that provide for accountability, yet at the same time are fair to the judiciary and do not curtail judges' obligation to rule honestly and according to the law.

Let us go through some of the issues examined in the previous sections. The first is the question of who may remove a judge. (We'll leave aside for the moment other forms of discipline.) In the federal system, it can be done only by the Governor General on a joint address by Parliament. I encountered no desire to change this requirement. To do so would, of course, require a constitutional amendment. The procedures that would be followed for a joint address, however, are, as previously discussed, not at all clear, as Canada has never actually completed the joint address procedure. Perhaps it would be wise for Parliament to consider the issue before a specific case arises, although it is conceded that there is no compelling necessity at present to do so. This could be something that the new Law Reform Commission could explore. Whatever procedures are devised, whether through legislation or otherwise, would not bind a future Parliament. This could be done only by a constitutional amendment. Still, it would have some moral force when an actual case arose. The procedure could include provisions dealing with what parliamentary body or committee would hear the evidence, whether the judge would be entitled to be heard and call witnesses, and what the standard and burden of proof should be.

At present, a simple majority in each House suffices. One constitutional amendment that should perhaps be considered is to raise the requirement beyond a simple majority of those voting. It could, for example, be two-thirds—or some such percentage—of those voting in each House or a simple majority of those eligible to vote. The present

system, in my opinion, gives Parliament—and therefore the government—too much power. One never knows what a future government that controls both the House of Commons and the Senate might wish to do.

Provincially appointed judges can in most provinces be removed by the Cabinet. In Ontario, however, removal is by the legislature; in Quebec, it is by the Court of Appeal; and in British Columbia it can in effect be by the Judicial Council itself.³ Removal of a provincially appointed judge is sufficiently important because of its effect on judicial independence that one wants substantial protection of the judge. In my view, it would be desirable for each province and territory to consider requiring that a final decision on removal be made either by the legislature, as in Ontario, or, perhaps, by the court of appeal, as in Quebec. In the case of the provinces, legislation could dictate the procedure to be followed by the legislature, and, as discussed with respect to Parliament, it would be desirable for some thought to be given to the issue in advance of an actual case.

At present, discipline of federally appointed judges short of dismissal is handled by the Canadian Judicial Council and of provincially appointed judges by provincially created judicial councils. If one were designing a system of discipline from scratch, one might wish to create greater integration of the disciplinary standards, procedures, and even persons deciding disciplinary issues for both federally and provincially appointed judges. After all, Canada has an integrated hierarchical legal structure, unlike the separate legal systems in the U.S. It is almost accidental, as we will see in the section on appointments, that the appointing power is in different bodies. Provincially appointed judges apply the exact same law as federally appointed judges. We have one legal system. There should, to the extent possible, be one set of standards of judicial conduct.

One could, for example, have one provincial or regional judicial council for both federally and provincially appointed judges. In the U.S., federal magistrates are disciplined by the same body that disciplines circuit and district court judges. And in England, the Lord Chancellor's office handles disciplinary matters for all levels of the judiciary. Nevertheless, I am not going to pursue the idea here. As a practical matter, it is not going to occur in the foreseeable future. There is at present sufficient mistrust between the two levels in most jurisdictions in Canada that the idea would be strongly resisted by federally appointed judges and perhaps also by provincially appointed judges. It is a concept that could be explored further at some future time.

Nevertheless, it is desirable to have the federal and provincial systems operating more in tandem than at present. In the following chapter, it will be argued that codes of conduct for federally and provincially appointed judges should for the most part be similar. The same standards of conduct should in general apply to all levels of the judiciary.

Further, I believe that it is desirable to include some federally appointed judges on provincial judicial councils. This would give greater credibility to the councils. In both Quebec and British Columbia there are no federally appointed judges, and in the new Ontario legislation there is only one. Unlike B.C., which has a majority of non-judges on the council, and Ontario, which has a majority (seven out of twelve) of non-provincially-appointed judges on the council, Quebec has eleven provincially appointed judges out of fifteen members on the council. Would a stronger component of federally appointed judges have given the Quebec Council greater credibility with the press and the public?⁴ Clearly, some councils in the past, including Ontario's, did not have sufficient input from provincial judges. I am not going to suggest precise numbers for provincial councils. Suffice it to say that in my view it would be desirable to have a substantial component of federally appointed judges—at least more than one—on provincial councils. Uniformity amongst provincial councils is, of course, not essential. There may be many local factors which will call for differences. The existing relationship of the provincial and federal benches, for example, is one important consideration.

The question then arises whether provincial court judges should be involved in disciplining federally appointed judges. In theory, there is much to be said in favour of this. Provincial judges would become more familiar with the procedures and standards applied by federally appointed judges, and *vice versa*, and they could add a knowledgeable and yet objective assessment to the issues. To the extent that non-federally-appointed judges are involved in the process, it is worth considering making at least one of those persons a provincially appointed judge—although I recognize that there might be quiet resistance—at least—from federally appointed judges to this suggestion.

One important issue is the separation of the investigation of the complaint from the adjudication of the complaint. As a matter of natural justice, the person who decides an issue should not have been involved in the earlier stage as an investigator. The Canadian Judicial Council changed its by-laws in 1992 to effect a separation, as have Ontario and Manitoba in the recent amendments to their complaints procedure. And in a previous section, it was shown that the recent American Bar Association model discipline procedures require such a separation. It should be noted, however, that the U.S. federal procedures seem not to be concerned with this issue. The chief judge vets the complaints and selects and chairs any special hearing committee that is set up. Petitions for review are heard by the circuit council, which, except in these cases, the chief judge chairs. In my opinion, this gives the chief judge too much power, or at least the appearance of too much power, over the proceedings. I prefer the separation adopted by the Canadian Judicial Council, the American Bar Association, and a few provinces and recommend that other provincial judicial councils adopt such separation. Moreover, I think that having the investigators and the adjudicators being part of the same organization, but playing different roles at different times by rotation is better than having completely separate bodies. Too much separation might result in the investigation division being *too* aggressive, which in the long run, unless clearly necessary, would harm the judiciary. The knowledge of the general process of

investigation and vetting is valuable to adjudicators and vice versa. Ontario and the American Bar Association have adopted this approach, as has the Canadian Judicial Council in that the chair of the Judicial Conduct Committee is not on panels, and members of a panel are not on an Inquiry Committee if one is established for that case. Moreover, those who are on a panel do not participate in the Council decision to send a matter to a formal investigation by an Inquiry Committee and those who are to be on the Inquiry Committee are removed from the deliberations of the Council on the case. I also agree with the A.B.A.'s recommendation that there be separate counsel for the investigative and the adjudicative stages.

There is one important feature of the U.S. federal system that I find very attractive. It is the involvement of the judge's own chief judge at the initial stages of the complaint. The chief judge of the circuit can dismiss the complaint if it is not in conformity with the Act, relates to the merits of a case, or is frivolous. In addition, and most importantly, the chief judge can attempt to resolve the complaint through discussions with the judge involved. (I would not envision negotiating with the complainant, although clarification might be sought in some cases.) As discussed in the U.S. federal section, the procedure gives the chief judge significant influence with the judge because the judge knows that the issue can be taken to the special committee stage. Indeed, a recent amendment permits the chief judge to act in the absence of a formal complaint. A number of the provinces also give the chief judge of the provincial court power to attempt to resolve the complaint at the very early stages. It seems to me that this makes good sense. Except in extreme cases, the real purpose of the legislation is to change undesirable conduct, not to discipline the judge.

In other institutions in society, it is usually the supervisor of the person concerned, or the chair of a department, or an official in a government department, who first tries to resolve a complaint from the public. The complaint would not automatically be sent to the head office of a commercial organization, to the central administration of a university, or to the premier's office to be dealt with. Of course, I am not talking about criminal conduct or other serious conduct.

The Canadian Judicial Council's procedures do not officially provide for this approach. Complaints that are sent to the Canadian Judicial Council in Ottawa are dealt with by the Judicial Conduct Committee (that is, the chair, initially, and later, in some cases, panel members). It is true that the relevant chief justice is notified of the complaint at the same time as is the judge subject to the complaint, but the decision on what to do about the complaint still remains in the hands of the Judicial Conduct Committee. Even if the complaint first comes to a chief justice, it seems that there may be an obligation to pass it on to Ottawa. By-law 8.02(b) and (c) states:⁵

- 8.02 (b) Every complaint or allegation received by any member of the Council concerning the conduct of a judge which, in the opinion of such member, may require the attention of the Council, shall be sent to the Executive Director.

(c) A Council member shall draw to the attention of the Executive Director any conduct of a judge of that member's court which, in the view of that member, may require the attention of the Council, and such conduct shall be treated in the same manner as if it were the subject of a complaint.

Many chief justices *do* deal informally with complaints they receive. The by-law gives some discretion in that it states: "in the opinion of such member, may require the attention of the Council."⁶ Judges know that the chief justice may send on a matter to the Canadian Judicial Council even in the absence of a complaint if the matter "may require the attention of the Council". This gives the chief justices significant leverage in discussing matters that have been brought to their attention. As in the U.S. federal system, this informal activity is potentially one of the most effective ways of controlling undesirable conduct. To repeat again what one U.S. chief judge stated: "You get the right result without unnecessarily humiliating or degrading anyone."⁷

Some chief justices and administrative judges, however, send on the complaint to Ottawa or, more likely, tell the complainant that the complainant may do so. In any event, many departments of justice, law societies, and other bodies now quite appropriately tell complainants about their right to send a complaint to the Canadian Judicial Council. So it is often accidental whether the complaint first comes into the chief justice's hands to enable the chief justice to attempt to resolve it informally. I would suggest that the Canadian Judicial Council's by-laws be changed to provide that a chief justice first have the opportunity to deal with a complaint sent to the Council, unless the matter is so serious that it should remain with the Canadian Judicial Council or unless the chief justice is unwilling or unable to deal with it. A similar procedure should be considered for provincially appointed judges. The chief justice should be able to dismiss the complaint on any of the grounds now used by the chair of the Judicial Conduct Committee, that is, that the complaint is "trivial, vexatious or without substance."⁸ In many cases the chief justice would simply say, as the chair of the Judicial Conduct Committee now says, that the matter is one for appeal.

The chief justice, or possibly some other judge or judges from the court, should also have the right to attempt to resolve the complaint. In consultation with the judge who is the subject of the complaint, the chief justice might, for example, offer the judge's apology for a comment made in the heat of a trial, or outline why a judgment has not yet been released and say when it is expected. Or, as sometimes occurs, the chief justice might arrange with the judge to attend a particular education program or undertake a medical or alcohol treatment program. These are not matters that need initially go to the Canadian Judicial Council. Many of these matters can be resolved quickly. If they do go to the Council, the result may not be as good. It becomes a "federal case", positions harden, and the informal resolution of what might indeed be a problem becomes less important. There would therefore be far less anxiety amongst members of the judiciary with this suggested procedure than exists today.

The complainant should, however, have the right to take the matter to the Canadian Judicial Council, and the chief justice who dismissed or otherwise dealt with the complaint should be obliged to tell the person about this further avenue. In such cases, the Council would continue to operate with its present procedures, which in my view are working reasonably well. The chair of the Judicial Conduct Committee would assess the complaint in the light of the comments and actions taken by the chief justice. The chair could dismiss the complaint, do further fact-finding through a special investigator, or set up a panel of the committee to consider the complaint. As stated in an earlier section, having reviewed the files covering the past few years, I can state that the Executive Director and the Judicial Conduct Committee take their work in dealing with complaints very conscientiously.

The system suggested above would therefore combine the best features of the U.S. decentralized system with the Canadian centralized system. One additional advantage of the system is that it would cut down to a considerable extent the work required in dealing with complaints at the level of the Canadian Judicial Council. There are now about 150 complaint files a year handled by the Canadian Judicial Council. As we saw earlier, the American federal experience is that in only about one-quarter of the complaints received and dismissed by a circuit chief judge is there a further petition for review.⁹ That percentage might be somewhat higher in Canada because of the reluctance of U.S. Circuit Councils to review cases on a petition for review. I would estimate—although this is obviously a guess—that perhaps one-third of the 150 complaint files now dealt with would still have to be dealt with by the chair of the Judicial Conduct Committee. Of course, the number under the existing procedures is likely to go up if greater publicity is given to the existence of the complaint process, a subject that will be dealt with later. If some change in procedure is not made, then the workload of the Judicial Council would have to be handled differently, particularly if the number of complaints continues to rise. One solution recently adopted by the C.J.C. (September, 1994) was to increase the number of vice-chairs of the Judicial Conduct Committee.

The Executive Director should have greater resources to deal with complaints, even if the above procedures are adopted. At present, the Executive Director not only initially receives all complaints and in many cases suggests what procedures should be followed, but also handles all the other functions of the Canadian Judicial Council, with its various working committees, annual and semi-annual meetings, an annual one-day seminar, and various research projects. Including herself, there are only three persons handling the work. In contrast, it will be recalled, the New York Commission, which deals solely with complaints, has a full-time staff of 35 persons and a budget of two million dollars U.S.¹⁰ The annual budget for all of the activities of the Canadian Judicial Council, including salaries and professional services, is just over \$500,000 Canadian.¹¹

The visibility of the process is also a matter that requires careful consideration. At the early stages of the process, there has to be a large measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the

credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing. (One cannot prevent a complainant from going public.) There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers.¹² And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken.

When the matter goes to a full hearing, however, the normal rule in most jurisdictions in North America has been and should be that the proceedings are open to the public. This is the new A.B.A. rule. It has also been the recent practice of the Canadian Judicial Council. And when an inquiry is ordered by the Minister of Justice or an Attorney General, it can be ordered by the Minister to be open.¹³ It will be recalled, however, that some provinces provide for closed hearings.¹⁴ It is not easy to justify a closed hearing—even though it may damage a judge's reputation if the complaint is dismissed—when the judiciary itself favours open hearings, except in exceptional circumstances.¹⁵

Because of the expectation that a full hearing will normally be a public one, there is an understandable trend to make sure that there is a strong case to warrant subjecting the judge to the harmful effect of a public hearing. The Canadian Judicial Council now uses a non-public three to five-person review panel after a decision by the chair of the Judicial Conduct Committee that the complaint should not be dismissed, but prior to a formal Inquiry. Ontario adopted a similar technique of a non-public review by a four-person review panel,¹⁶ and Manitoba has interposed a non-public Judicial Inquiry Board.¹⁷ The Canadian Judicial Council has adopted the technique of describing in its annual report in some detail, but without identifying the judge, all cases that have gone on to a panel. Ontario and Manitoba also provide for an annual report.

Thus the formal Inquiry stage and, to a lesser extent, the panel stage are given a fair degree of visibility. It is the earlier investigative or screening stage which is not now visible. But this is the stage where 95% of the cases are disposed of. Society rightly wants to be assured that these decisions are fair ones and do not improperly cover up judicial misconduct. How can visibility best be achieved? The techniques adopted will vary from jurisdiction to jurisdiction, depending on such factors as, in the case of provincial councils, the mix of federally and provincially appointed judges on the council (it is arguable that the greater the number of federally appointed judges, the more assurance society has that improper conduct is not being overlooked), or the number of judges in the province (the greater the number, the less danger that disclosure of sanitized documents will identify a judge).

Let us examine a number of possible techniques to achieve visibility. The most common is to have lawyers or lay members on the council as a proxy for the public

The new Ontario legislation, for example, has an equal number of judges and non-judges on the council, with the judicial chair having the deciding vote. The initial screening is done by a two-person subcommittee consisting of a provincial court judge and a lay member, and the four-person review panel consists of two judges, a lawyer, and a lay person. Other provinces, such as British Columbia, give lawyers and lay persons a majority of places (four out of seven) on the council. Because British Columbia has no federally appointed judges on the council, it may have been felt that public confidence in the judiciary required more lawyers and lay persons. The number may also vary according to the public's regard for the tribunal. In the U.S., for example, many elected state courts are not as highly regarded by the public as federal courts and therefore may require a larger involvement of non-judges than the federal courts require in order to assure the public that everything is above board. Indeed, the U.S. federal courts do not have anyone other than judges involved in discipline, and the recent National Commission on Judicial Discipline and Removal did not recommend that any others be added.

In the U.S., visibility is given to the federal chief judge's vetting decisions by another technique. In almost all circuits, the decisions of the chief judge dismissing or resolving a complaint are open to inspection by the public and the press in a sanitized form that does not identify the judge. The National Commission recommended that these should be available in all circuits and that the chief judge's dismissal order be accompanied by a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. One wonders how such a technique might work in a small jurisdiction, where it may not be difficult to identify the judge involved. In the U.S. federal system, each circuit covers a number of states and a population in some cases equal to that of all of Canada. Perhaps more than one jurisdiction in Canada could be combined for this purpose. Or perhaps the response should be available in Ottawa for all jurisdictions.

The U.S. federal system, as does the Canadian Judicial Council, also provides a summary of the number of complaints brought. If the procedure outlined above, giving the chief justice the initial responsibility for dealing with the case, is adopted, these dispositions of, at least, written complaints originally sent to Council should probably be reported to the C.J.C. and set out in the Council's annual report. Similar reports will now be provided in Ontario and Manitoba under their new legislation. Detailed annual reports should also be available in each jurisdiction in Canada. A number of judges indicated to me that they felt that complaints should not be called "complaints" in the annual reports. The public, they said, would conclude that these are well-founded complaints, in spite of the fact that the annual report states that 95% of them are dismissed at the outset. I have, however, been unable to come up with a better word to use than the word "complaint".

One further technique that has recently been suggested by the chair of the Judicial Conduct Committee¹⁸ is to have a well-respected person or persons review the complaint process at various intervals. This is the technique adopted for the Security Intelligence Review Committee (SIRC) to review the work of the Canadian Security

Intelligence Service (CSIS).¹⁹ The members of SIRC are to be chosen from Privy Councillors, but the government can in fact select whomever it wishes by first appointing the persons Privy Councillors. In the case of the judiciary, if such a technique is used, it would be better to find an existing body over which neither the government nor the judiciary has control from which to make the selection. So, for example, the President of the Royal Society of Canada could select, say, a lawyer from among its members (there are at present about 20 non-judicial legal members) along with another Royal Society member to review the complaint process at the end of each year or every second year. Another possible pool are Officers or Companions of the Order of Canada, perhaps selected by the Governor General.

What technique or combination of techniques would be best for the Canadian Judicial Council? Readers will have their own views of the proper mix. Mine is that there should be a modest amount of lay and lawyer participation in the panels and formal Inquiries, full disclosure in a sanitized form of all complaints, plus a periodic external review of the decisions made in the complaint process. I suggest that each non-public pre-Inquiry panel include a lawyer or lay person selected from the same group proposed earlier. A panel might therefore consist of two judges and a lawyer or lay person. The lawyer or lay person could be selected, for example, by the President of the Federation of Law Societies. (Whether there should be lay participation on the Canadian Judicial Council itself is an issue that I have not dealt with in this Report.)

The external review technique, as suggested above, might occur once a year—or perhaps every two years—covering the previous year's activities and could be set out in the annual report in much the same way as an auditor's report is set out in a company's annual report. Should the review include dispositions made by chief justices under the procedure suggested earlier in this section? It is perhaps not necessary to include these as a matter of course, assuming that the system gives the complainant a right to have the matter considered further by the chair of the Judicial Conduct Committee. Dispositions which had originated with a complaint to the Canadian Judicial Council or otherwise reached the Council should, however, probably be included.

Finally, we come to lay participation in formal Inquiries. The Act specifies that the Inquiry may include one or more lawyers. Recent formal Inquiries (Gratton and Marshall) have included two lawyers appointed by the Minister of Justice. It would be better to provide that non-judicial participation could be by both a lawyer and a lay person. And again, it should not be the government that selects the individuals; there should be some objective method of selecting a pool the Council can draw from, with perhaps in this case (for both lawyers and lay persons) the selection being made by the President of the Federation of Law Societies or of the Canadian Bar Association or of the Canadian Institute for the Administration of Justice. The Inquiry proceedings, except in exceptional circumstances, would be public and the purpose of the participation would be more to have input into the decision and less to give visibility to the process.

In my view, it is undesirable for the government to have control of the composition of an Inquiry Committee. The government should not have any influence on the result. It is for this reason that the suggestion that there be a government-appointed ombudsman who investigates the judges is not desirable.²⁰ It has also been suggested²¹ that the Canadian Judicial Council is really an administrative tribunal and that therefore its legality is suspect under the Constitution. I have some difficulty accepting this argument. Surely the Supreme Court of Canada would uphold the validity of the C.J.C. as a federally constituted court in relation to disciplinary matters.²² The Judges Act now deems the Council to be a Superior Court for certain purposes.²³ Still, I have to be cautious in expressing an opinion, considering that the source of the suggestion, Chief Justice Lamer, will have the final say in the Supreme Court of Canada. I leave it to the constitutional lawyers in the Department of Justice to explore this issue further.

If the above suggestions are adopted, there would be substantial assurance to the public that complaints are being treated conscientiously. There would be public disclosure in a sanitized form of the complaints dealt with, descriptions of the cases in the annual reports, a periodic retrospective review of the screening or investigation stage of the complaint process, a lawyer *or* lay person on each panel, and a lawyer *and* lay person on each Inquiry Committee.

Another issue is how to make knowledge of the system more readily available. The U.S. National Commission found that there was widespread ignorance about their 1980 Act and recommended that both the bar and the federal judiciary increase awareness of and education about the Act. It suggested that the existence of and explanation of the Act should, for example, be included in the rules of court.²⁴ A similar approach should be taken in Canada. Materials on the process should be easily available in libraries and law society offices, for example. Whether one wants to go further, as Ontario has done, and legislate that signs should be posted in court houses and that a toll-free number be provided is another matter. In my opinion, one wants to make the complaint process accessible but not actively encourage complaints.

One aspect of the composition of judicial councils found in most provincial councils and in the U.S. federal system, but not in the Canadian Judicial Council, is the involvement of puisne judges in the process. In my view, it would be desirable to involve puisne judges in discipline matters, even though they are not now involved in regular meetings of the chief justices. To involve them in discipline would give them a greater stake in the process and would ensure that it is not solely the chief justices who are making the decisions. The discipline process devised in 1971, when the Council was established, was consistent with that found in other institutions, such as universities, at the time. It was then the deans of the faculties who disciplined students; in later years, however, a more representative composition was established. A similar approach should be taken with respect to judges. There could, and in my opinion should, be a puisne judge on each panel and Inquiry Committee. How would the selection be made? It could perhaps be by the chair of the Judicial Conduct Committee from a panel of judges chosen after consultation with the Canadian Judges Conference.

A further issue that requires consideration is whether the Minister of Justice and the provincial Attorneys General should have the right to direct a formal inquiry. Because part of the reason for setting up the Council was to provide the Minister of Justice with Council's view of a disciplinary issue that might lead to a joint address, it appears desirable to continue to give the Minister of Justice the power to demand an inquiry. But should the provincial Attorneys General have the same right? In fact, it has rarely been exercised. There has been only one instance in which a provincial Attorney General has ordered an inquiry. That was in the case involving the appeal court judges in the Marshall case. Nevertheless, in my view, only the federal Minister of Justice should have the power to order an inquiry. A provincial Attorney General can always ask the Council to examine a matter, but then it is up to the Council to determine whether the matter warrants a full formal Inquiry. The danger in giving this power to the provincial Attorneys General is that they may order an inquiry for political purposes, although it is conceded that it has not so far been abused. If a provincial Attorney General wants a public inquiry, he or she, in my view, should have to persuade the Council to undertake one or the federal Minister of Justice to order one.

What sanctions should be available to a judicial council? As we have seen, the Canadian Judicial Council now exercises the right to criticize a judge for improper conduct and will make its criticism public in appropriate cases. It is usually referred to as an "expression of disapproval". Similar powers are exercised in the U.S. federal system. The use of such a public criticism or reprimand is never taken lightly either in the U.S. federal system or by the Canadian Judicial Council. In most cases, the matter will already have been public and the failure to comment publicly on the conduct would create even more undesirable adverse comment about the judiciary. Perhaps for this reason, the Canadian Judges Conference agrees that public criticism should be available to the Council.²⁵ I am not sure that I see much difference between the words disapprove, criticize, admonish, or reprimand, although they seem to indicate an increasingly stronger degree of concern. Perhaps with the addition of the word "warn", included in the new Ontario legislation,²⁶ all these words should be included in the Judges Act to indicate that Council can say what is appropriate in the circumstances without necessarily giving a particular label to their actions.

I am not persuaded, at least for the federally appointed judges, that any further sanctions are needed. The Council can, of course, express its view that the judge should change his or her conduct in some way. This was one of the purposes in establishing the Council, according to my reading of the available evidence. The Council, for example, can say that the judge should get judgments out more quickly or recommend that the judge should undertake alcohol treatment or take a particular educational course. These are the types of suggestions that a chief justice would make in appropriate cases and probably would already have done so in the particular case. There would be a strong incentive for the judge not to disregard the Council's view in that repetition of the conduct would normally be treated more seriously by the Council in the future and if persisted in could lead to a recommendation that the judge be removed from office. The Council should also be able to recommend to the judge's chief justice that the judge not be assigned cases during a period of education or

treatment. In my view, no specific legislation is needed for these recommendations. They are, in my view, part of the inherent remedial and supervisory authority of a chief justice and the Council. The Council, I believe, takes too restrictive a view of its authority. The 1993 Annual Report states, for example, that “the Council must measure all complaints against the ultimate sanction of removal of the judge in question from office.”²⁷ I consider that its supervisory power is wider than that. If it is not, it should be made clear by legislation. Certainly Chief Justice Laskin took the view that Council could do more than recommend removal. In a speech to the Canadian Bar Association in 1982, he stated: “the Canadian Judicial Council is not limited to recommending removal or dismissal; it may attach a reprimand or admonishment without either recommending removal or abandoning the complaint.”²⁸ No doubt he would have agreed with my view of the supervisory authority of the Judicial Council. In any event, the powers of the Canadian Judicial Council should be clarified by legislation.

Some provincial councils provide for the possibility of suspension without pay. Ontario, for example, permits its council to order up to a 30-day suspension without pay,²⁹ and Manitoba also provides for the possibility of suspension without pay during the period that the judge is receiving education or treatment.³⁰ It would not be reasonable to have a much longer period of suspension because judges are not permitted to engage in outside work and so for the most part rely on their judicial salaries. Again, I am not persuaded that such provisions are necessary or desirable, assuming that they would be constitutionally valid at the federal level. They would almost never be used and seem inconsistent with the dignity of the office of a judge who is to continue serving as a judge.

There is also the question of the procedures to be followed for a formal Inquiry. There are many issues that could be examined, such as the burden of proof, whether the judge must give evidence, and who pays for the judge’s counsel. The American Bar Association, as previously stated, worked out sensible model rules that could be applied throughout the United States. It would be useful to develop a set of model rules applicable to Canada. I suggest that the Canadian Judicial Council consider inviting the chief judges of the provincial courts, the Federation of Law Societies or the Canadian Bar Association, and representatives of federally and provincially appointed judges’ associations to develop a set of model rules that individual judicial councils might wish to adopt.

I also raise here an issue that law societies and bar associations across the country raised with me. How does a lawyer communicate concern about a judge’s conduct without paying the consequence of being a whistle blower? A number of provinces have set up Bench/Bar committees to address this issue.³¹ The reported experience has not, however, been very positive. Lawyers continue to be reluctant to complain. One solution is to have the communication take place through the secretary of the provincial law society directly to the chief justice. One would not expect that these oral communications would be counted in any statistics on complaints received. There is still the danger with this proposed system that the real source of the complaint can be

identified, and whatever system is chosen lawyers will continue to be reluctant to complain through these channels.

Finally, I have not said anything in this last section about procedures to handle incapacity. As stated in earlier sections, this should not be viewed as a disciplinary issue and other techniques should be devised to handle the issue apart from labelling it misconduct or lack of good behaviour.

CHAPTER SIX: CODES OF CONDUCT

All American jurisdictions—state and federal—have judicial codes of conduct. In Canada, only British Columbia and Quebec have them. In this chapter, we examine the utility of having a judicial code of conduct.

1. CANADIAN CODES

The Canadian Judicial Council has examined this issue on a number of occasions. As one of its first efforts, the Council in 1973 referred to its Research Committee the question of whether there should be a code of ethics. The Research Committee recommended against it. Codes were needed in the United States, they thought, because of problems there with the judiciary; English judges did not have a code and yet their judges were internationally respected. In any event—it was thought—a code was not really needed in Canada. Perhaps most important was the view that whether the conduct of a judge was proper or improper, and, if improper, how serious, depended upon the circumstances at the time, and to attempt to codify such circumstances would be impossible.¹

As a substitute, the Research Committee produced a book, published in English in 1980, by J. O. Wilson, the retired Chief Justice of British Columbia, *A Book for Judges*,² and another book, published in the same year in French, by Gérald Fauteux, the retired Chief Justice of Canada, *Le Livre du Magistrat*.³ In the preface to the former, Chief Justice Bora Laskin noted: “It was the conviction of the Council that a systematic presentation of the legal and ethical problems that confront Judges, especially newly-appointed ones, in the administration of the functions of the judicial office and suggested solutions for such problems...would assist them in carrying out their duties.”⁴ The result was not an authoritative directive, as a code would be. Chief Justice Laskin stated: “It must be emphasized that *A Book for Judges* is not an official directive of the Canadian Judicial Council to federally-appointed Judges. Although comments and suggestions were made by various members of the Council in the successive drafts produced by Mr. Wilson and Mr. Fauteux, the final product is that of each of them as an independent author.”⁵ Wilson described the product as “friendly advice from experienced judges to brother judges.”⁶ Fortunately, the two books took roughly the same approach to issues. Wilson wrote: “I am vastly heartened by the fact that, where we have written on the same subjects, our views concur.”⁷ The book was designed for federally appointed judges, but Chief Justice Laskin noted that “provincially-appointed Judges...would find most of the material in the two books equally useful to them.”⁸

In 1988-89, the Council again looked at the issue of a code. It assigned the task to the successor of the Research Committee, the Judicial Independence Committee. Its task was to attempt to formulate a “Statement of Practical Ethics.” The Canadian Bar

Association had set up a Committee in 1983 to examine judicial independence, which would normally include a discussion of codes of conduct. But the chief justices persuaded the Committee not to deal with the subject of a code. "If there is to be a review of principles governing judicial conduct, or the determination of the parameters of judicial independence," one influential chief justice wrote, "such areas of action are for the Canadian Judicial Council."¹⁰ The report of the C.B.A. Committee, published in 1985, adopted this approach, stating: "A...topic not studied by this Committee was a code of ethics for judges. This was in accordance with the wishes of the judges themselves who did not think it appropriate for the Bar to propose such a code. The Committee agreed that it was preferable for the judges to address the issue of judicial ethics at this time."¹¹

The Council did not, however, produce a code. Instead, in 1991 the Council published a book, *Commentaries on Judicial Conduct*.¹² Chief Justice Lamer's foreward stated that "it was not the original intention of the Council to produce a book in the form here published."¹³ The project, he went on to say, "was not universally accepted or applauded," and once again the Council rejected the idea of a code, Lamer C.J. stating: "It became clear to the Committee early on in its work that to develop a set of general principles as initially envisioned would not be a particularly useful endeavour. Either they would be of such a general nature as to be of little guidance, or, perhaps so specific as to be illogical and irrelevant to the many varied issues which face judges in their day to day activities."¹⁴ The book, written by a Committee chaired by Chief Justice Laycraft of Alberta was designed to "expand and update" thinking about some of the issues addressed in the Wilson and Fauteux books and "to discuss topics not addressed in them."¹⁵

The Committee sent questionnaires to more than 100 federally appointed judges. "On most of the topics raised," the Committee stated in the book, "the responses contrast from black to white and across several shades of gray."¹⁶ In these cases, the Committee presented various perspectives and then left it up to the judge: "The reaction to any specific problem, in particular circumstances, and in a particular community, will then be for the judge to make."¹⁷

As mentioned above, there are two provincial codes. The Code of Conduct produced in 1981 by the Quebec Judicial Council contains the following ten sections:¹⁸

1. The judge should render justice within the framework of the law.
2. The judge should perform the duties of his office with integrity, dignity and honour.
3. The judge has a duty to foster his professional competence.
4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions.

5. The judge should be, and be seen to be, impartial and objective.
6. The judge should perform the duties of his office diligently and devote himself entirely to the exercise of his judicial functions.
7. The judge should refrain from any activity which is not compatible with his judicial office.
8. In public, the judge should act in a reserved, serene and courteous manner.
9. The judge should submit to the administrative directives of his chief judge, within the performance of his duties.
10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.

How helpful these very general provisions are, standing alone, is open to question.

British Columbia's Code of Judicial Ethics was produced in 1976. It was adopted by the Provincial Judges Association of British Columbia and by the B.C. Judicial Council. It was revised in 1993 in order to introduce gender-neutral language. The B.C. Code is more detailed than the Quebec Code and contains a commentary, or what are called "considerations", after each section. Rule 2.00 of the B.C. Code, for example, — "Judges must devote themselves entirely to the exercise of their judicial function" — is similar to the second half of Rule 6 of the Quebec Code, but adds the following "considerations":¹⁹

- 2.01 The rule conforms with Section 8 of the Act.
- 2.02 The essence of this rule is the assurance that the impartiality of judges is never placed in doubt.
- 2.03 Upon accepting an appointment to the bench, judges consent voluntarily to the acceptance of certain advantages as well as certain prohibitions.
- 2.04 Subject to any legislation to the contrary, and as long as judicial functions do not suffer, judges may without remuneration or honorarium:
 - a) participate in legal activities. Without limiting the generality of the foregoing, judges may teach law, attend conferences, write articles or treatises, work on committees;
 - b) participate in activities related to the community, to charities, to the arts, and to sports, it being recognized that a judge isolated from society is one who cannot keep in touch with its

evolution. However, judges should not participate in fundraising activities.

The British Columbia Code, in my view, is an improvement on the Quebec Code.

Other provinces are considering codes of conduct. The new Ontario Act specifically deals with the topic. Section 51.9 states:²⁰

- (1) The Chief Judge of the Provincial Division may establish standards of conduct for provincial judges, including a plan for bringing the standards into effect, and may implement the standards and plan when they have been reviewed and approved by the Judicial Council.
- (2) The Chief Judge shall ensure that the standards of conduct are made available to the public, in English and French, when they have been approved by the Judicial Council.
- (3) The following are among the goals that the Chief Judge may seek to achieve by implementing standards of conduct for judges:
 1. Recognizing the independence of the judiciary.
 2. Maintaining the high quality of the justice system and ensuring the efficient administration of justice.
 3. Enhancing equality and a sense of inclusiveness in the justice system.
 4. Ensuring that judges' conduct is consistent with the respect accorded to them.
 5. Emphasizing the need to ensure the professional and personal development of judges and the growth of their social awareness through continuing education.

The Wilson Task Force on Gender Equality for the C.B.A. proposed that Judicial Councils adopt codes of conduct. Recommendation 10.11 states: "The Task Force recommends that the Canadian Judicial Council develop a Code of Judicial Conduct which includes complaint mechanisms and graduated levels of sanctions for breach of its provisions and that the Code be freely available to the profession and the public."²¹ As will be seen in the discussion that follows, I agree with the Wilson Task Force that a code is desirable, but it should not, in my opinion, be so *directly* linked to the discipline process.

2. U.S. CODES

The American Bar Association produced its first code—called “Canons of Judicial Ethics”—in 1924. The Code, drafted by a committee headed by Chief Justice William Howard Taft, was intended to be an ideal guide of behaviour, rather than an enforceable set of rules.¹ The A.B.A. had adopted Canons of Professional Ethics for lawyers in 1908, following Roscoe Pound’s famous speech in 1906, “The Causes of Popular Dissatisfaction with the Administration of Justice.”² No canons for judges were prepared at the time because, as one commentator states: “Many in the American Bar Association governing board apparently believed that ethical standards for judges were unnecessary because the issue was judicial competency, not judicial honesty. Others felt that judges, not lawyers, should develop standards for judges.”³

The event that caused the A.B.A. to change its mind and draft canons was the selection of U.S. District Court Judge Kenesaw Mountain Landis of Chicago as the Baseball Commissioner following the so-called “Black Sox” scandal of 1919. It was probably less the fact that Landis was the Commissioner while still a judge that caused concern than the fact that he was able to add the Commissioner’s \$42,500 salary to the \$7,500 he earned as a judge. So in 1921 the A.B.A. convention passed a resolution of censure and appointed a committee to propose standards of judicial ethics.⁴ The Canons were adopted for use in many states, although they were only occasionally enforced.⁵

In 1972, the A.B.A. approved a new Model Code of Judicial Conduct—this version was called a Code—produced by a committee chaired by Justice Roger Traynor of California.⁶ This Code was widely adopted across the United States. Forty-seven states and the federal judiciary adopted it in whole or in part. The federal adoption in 1974 no doubt added further respectability to the Code. “The widespread adoption of the Model Code,” the authors of the fine text *Judicial Conduct and Ethics* state, “provides a degree of uniformity from jurisdiction to jurisdiction, and forms the foundation for a national body of law concerning judicial conduct. The vast majority of judges, both state and federal, are subject to the Code of Judicial Conduct.”⁷ It is ironic that the United States with its different systems of law has more uniformity with respect to judicial conduct than Canada with our one unified system of law.

A revised A.B.A. Model Code of Judicial Conduct was passed in 1990. The new Code adopts gender-neutral language, combines a number of canons dealing with off-the-bench conduct into one canon, adds a preamble and more commentary, and makes a number of specific changes. But, as the authors of *Judicial Conduct and Ethics* state, “the 1990 revision retains the same basic standards that govern judicial conduct as the 1972 version of the Code.”⁸ “Perhaps the most important tenet in the Code”⁹ is still Canon 2, which states, as it did in 1972, except for the introduction of gender-neutral language: “A judge should avoid impropriety and the appearance of impropriety in all of the judge’s activities.” The Commentary goes on to state that the test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity,

impartiality and competence is impaired.’’ The U.S. Federal Code adds after the words ‘‘create in reasonable minds’’ the additional words ‘‘with knowledge of all the relevant circumstances that a reasonable inquiry would disclose.’’¹⁰

The five canons in the 1990 Model Code of Judicial Conduct are set out in Appendix B to this Report. The commentary following each canon has not been included in the appendix, however, except that for illustrative purposes the commentary following Canon 3 has been included. The bare headings to the five canons are as follows:

CANON 1
**A JUDGE SHALL UPHOLD THE INTEGRITY AND
INDEPENDENCE OF THE JUDICIARY**

CANON 2
**A JUDGE SHALL AVOID IMPROPRIETY AND THE
APPEARANCE OF IMPROPRIETY IN ALL OF THE
JUDGE’S ACTIVITIES**

CANON 3
**A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL
OFFICE IMPARTIALLY AND DILIGENTLY**

CANON 4
**A JUDGE SHALL SO CONDUCT THE JUDGE’S EXTRA-JUDICIAL
ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH
JUDICIAL OBLIGATIONS**

CANON 5
**A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM
INAPPROPRIATE POLITICAL ACTIVITY**

One change made throughout the 1990 Code is the use of the word ‘‘shall’’ rather than the word ‘‘should’’. On the face of it, this change would appear to effect a shift from a precatory to a mandatory code. Shaman, Lubet and Alfini, in their text *Judicial Conduct and Ethics*, however, relying on the Reporter to the 1972 Code,¹¹ state that the 1972 Code was meant to be mandatory: ‘‘Although the 1972 Code used ‘should’

rather than 'shall', it definitely was meant to establish mandatory standards. The 1990 revision makes clear the mandatory nature of the Code."¹² One specific change in the 1990 Code was to make it improper for a judge to "hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."¹³ The 1972 Code, rather than having the prohibition in a canon, had it in the commentary and in a weaker form, stating: "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin...Ultimately each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination."¹⁴

Whether the 1990 Code will have as widespread an impact as the 1972 Code is not clear. A number of states have adopted it in whole or in part, and in September, 1992, the United States Judicial Conference made a number of revisions to the federal Code of Judicial Conduct that were based upon the 1990 Model Code. A few have rejected it, however.¹⁵ The Wisconsin Supreme Court, which has its own 1967 Code, rejected in a 4-3 vote a committee's recommendation (made after a seven-year study) to incorporate the 1990 Model Code.¹⁶ Justice Day for the majority thought the existing 1967 Code, which had, of course, been drafted before the A.B.A.'s 1972 Code, was better than the proposed code: "What minor deficiencies the present Code may have are minuscule compared to the vagaries, uncertainties and sources of endless litigation and interpretation the proposed new Code presents."¹⁷ Describing the 1990 A.B.A. Model Code as "the slide into the abyss", he went on to say that "there are enough controls to try and mold the judiciary into the image of social and political zombies to satisfy even the most touchy of the new 'politically correct' coterie."¹⁸ The canon prohibiting membership in organizations engaged in invidious discrimination was attacked: it would cause, the judge stated, the creation of "'a subversive list' like the U.S. Attorney General's notorious list during the height of the Cold War era."¹⁹ The minority, in contrast, argued that the proposed code was a significant improvement on the 1967 Code and urged its adoption.

Some states have adopted the Code with their own revisions. Texas, for example, did not adopt the mandatory word "shall", but said instead that the judge, for example, "should personally observe" high standards of conduct.²⁰ The Texas Code also added the word "knowingly" to the Model Code's prohibition on membership in an organization that practices invidious discrimination. Amongst other changes was one that omits the Model Code's prohibition on a judge's commending or criticizing jurors for their verdicts. And Texas omitted any commentary on the canons. Other states have comparable changes in language and policies.²¹

3. U.S. FEDERAL CODE

As stated above, amendments to the U.S. Federal Code were adopted by the Federal Judicial Conference in September, 1992. The Conference approved without

modification the revisions recommended by the Committee on Codes of Conduct, then chaired by Judge Walter K. Stapleton.¹ Like the A.B.A. codes, it uses canons and commentaries. Although it adopted a substantial amount of the A.B.A.'s 1990 Model Code, it stuck with the original seven canons, rather than the five proposed by the new A.B.A. Code.

One difference between the U.S. Code and the A.B.A. Code is that the U.S. Code has continued to use the word "should" rather than the word "shall", as set out in the A.B.A. Code. Whether or not the word "should" was meant to be mandatory in the 1972 A.B.A. Code, the very fact that the 1990 A.B.A. Code drew a distinction between the words may influence the interpretation of the word "should" in the future. The A.B.A. preamble states: "When the text uses 'shall' or 'shall not', it is intended to impose binding obligations the violation of which can result in disciplinary action. When 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined."² Moreover, and perhaps most importantly, the federal Code also uses the word "shall" in canon 3, with respect to disqualification. Unless this word crept in by error, the federal Code also intended to draw a distinction between "should" and "shall". The U.S. National Commission on Judicial Discipline and Removal states clearly that "the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act."³

In any event, the tone of the two codes strikes this reader as somewhat different, even apart from the word "should". The U.S. Code in its commentary to Canon 1 states:⁴

The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. ss 332(d)(1), 372(c)), although it is not intended that disciplinary action would be appropriate for every violation of its provisions. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution.

This language is for the most part almost identical to that of the A.B.A. preamble. The U.S. Code, however, does not include the following sentence found in the A.B.A. Code: "the text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them."⁵ Similarly, the A.B.A. Code gives equal weight to the

purpose of the Code as providing guidance and "a structure for regulating conduct through disciplinary agencies."⁶ As set out above, the U.S. Code gives greater weight to the former: "The Code is designed to provide guidance to judges and nominees for judicial office. The Code may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980."⁷ The link between the Code and the discipline process is, therefore, less direct in the federal system than in the state courts.

The federal Judicial Conference Committee on Codes of Conduct is also the body that renders confidential advisory opinions in response to confidential judicial inquiries.⁸ Discipline cannot follow after an advisory opinion.⁹ In addition, it publishes opinions on issues frequently raised or of broad application. As of September, 1991, there have been 86 published advisory opinions.¹⁰ In 1993, the Committee produced a 68-page Compendium of Selected Opinions, focusing primarily on its unpublished advisory opinions issued between 1979 and 1992.¹¹ The result of this activity is a relatively full store of material that can guide the U.S. federal judiciary. The U.S. National Commission on Judicial Discipline and Removal recommended that the Judicial Conference add to the Code "an express prohibition of judicial behavior that reflects or implements bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment."¹²

Let us examine how the U.S. Code handles some specific issues. I have chosen three: whether a judge can serve as an executor of an estate; when a judge should not hear a case in which a relative is a party or a retained lawyer; and when it is inappropriate for a judge to engage in out-of-court statements. A comparison will be made with Canadian material on these questions.

Can a judge serve as an executor of an estate? The Canadian Judicial Council's 1991 *Commentaries on Judicial Conduct* does not give a firm answer. It noted that opinion across the country was somewhat divided. "The overwhelming majority of respondents," the commentary states, "would serve as requested if the estate is that of a relative or close friend and appears to be simple and non-contentious. One respondent in five, however, would not ever accept appointment as executor or executrix...Many specified that they would accept no fee if they chose to accept the office."¹³ The Honourable J. O. Wilson is then quoted as stating that "generally" a judge should not act as executor of an estate, but may do so in the case of a relative or close friend "where only a simple and immediate distribution is involved, where no question may be asked of a court (and) where there is no likelihood that there will be disputes leading to litigation."¹⁴ Nothing is said by Wilson about accepting a fee and the very elastic words "close friend" are not defined.

The U.S. Federal Code limits a judge's becoming an executor to estates of family members. "A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties."¹⁵ The canon goes on to provide that in such a case the "judge

should not serve if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.”¹⁶ The commentary and the compendium of selected opinions expand somewhat on the meaning of some of the terms.

When should a judge disqualify himself or herself because a relative is involved in the proceedings? The Canadian Judicial Council’s *Commentaries on Judicial Conduct* is helpful, but not authoritative, stating:¹⁷

No judge would try a case in which a close relative or a close friend was a party or a witness but the dividing line between the proper and the improper is not always easy to define. As to actual relationship, both English and American authority state the prohibition as applying to relationships in the first, second or third degrees which is to say parents, grandparents, sons and daughters, nieces and nephews, aunts and uncles. Beyond that, the sufficient relationship is not clear and would presumably depend on individual circumstances.

Presumably, this is saying that Canadian judges should follow the English and American rule, but this is not clear. Nor is it clear what the rule should be when a relative acts as a lawyer in the case. Quebec judges, on the other hand, have definite rules as a result of the Quebec Code of Civil Procedure.¹⁸ A judge may be disqualified¹⁹ if the party is a cousin of the judge, that is, a fourth degree of relationship. In the case of a lawyer, the disqualification will occur only if the relationship is in the second degree.

The U.S. Code has relatively clear rules on the question of the degree of relationship applicable to all federal judges. Canon 3C(1)(d) states that “a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which...

- (d) the judge or the judge’s spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
 - (iv) is to the judge’s knowledge likely to be a material witness in the proceeding.²⁰

The commentary notes that the canon would disqualify the judge if the parents, grandparents, uncle or aunt, brother or sister, niece or nephew of the judge or judge’s

spouse, or the spouse of any of the foregoing, were a party or lawyer in the proceedings, but would not disqualify the judge if a cousin were a party or lawyer in the proceeding. The commentary also notes that the fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge, although, as in any of these situations, the particular circumstances may require the judge's disqualification.

Finally, we look at the rules relating to out-of-court statements. We have already touched on the Canadian approach to that issue, an approach which leaves many of the basic rules not as clear as they should be. The U.S. Code gives a number of helpful approaches to the subject, although the application of the rules to any specific case will often not be easy. Canon 3A(6) makes it clear that the judge should avoid public comment on the merits of pending cases, stating: "A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education."²¹ The commentary to the section states that "the admonition against public comment about the merits...continues until completion of the appellate process."²²

Canon 4A makes it clear that "a judge may speak, write, lecture, teach, and participate in other activities."²³ The commentary states: "As a judicial officer and person specially learned in the law, a judge is in an unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that the judge's time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law."²⁴ Finally, canon 7 provides that "[a] judge should refrain from political activity" and describes some of the political activities such as endorsing or opposing candidates for public office, and contributing to a political candidate or organization. It is "virtually certain," consultants to the National Commission have written, that these provisions would be upheld constitutionally: "In light of the courts' prior determinations that preserving public confidence in the integrity of the judiciary is a *compelling* state interest, it is virtually certain that this balance would tip the outcome in favor of the constitutionality of the Code's restrictions."²⁵ The Code is of course drafted by the judges. The consultants note that if it was imposed by Congress "such legislation would raise serious questions concerning the independence of the judiciary and the separation of powers doctrine."²⁶

The above rules are probably not significantly different from the rules that Canadian judges would devise, if they chose to do so. The question is, should they so choose?

4. CONCLUSION

The three examples above are fairly typical of the difference between the U.S. and the Canadian approach. In my view, the American codes are superior to the informal Canadian *Commentaries on Judicial Conduct*. They give relatively clear guidance and provide mechanisms for getting confidential rulings on specific issues. Why should Canadian judges struggle to ascertain what the standards are? Moreover, as previously stressed, they provide a measure of uniformity across the United States that is now lacking in Canada. An attempt should be made to draft a model code that could be adopted across the country.

I will not set out in any detail what I think the code should contain. That will be for the drafters. It is reasonably clear from my earlier comments, however, that the U.S. federal Code would be a good starting point. I personally like their approach in using the code primarily for guidance rather than for discipline. I also like the division of the code into general and particular canons and further commentary. The use of comprehensive advisory opinions is also very helpful, as are confidential opinions on specific issues.

Who should draft a model Canadian code? I think the Canadian Judicial Council should take the lead and set up a working committee, perhaps consisting of representatives of the Council, the provincial chief judges, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges,¹ and lawyers' organizations (perhaps the Federation of Law Societies or the Canadian Bar Association.) In October, 1994 Chief Justice Lamer announced that the Canadian Judicial Council "is working with representatives of the Canadian Judges Conference to set the wheels in motion for the preparation for discussion of a draft Code of Judicial Conduct."² It is likely that the strong resistance to a code in the past by some members of the Canadian Judicial Council will be absent as more and more judges have lived as lawyers, and particularly as benchers, with codes of conduct for lawyers. It is hoped that at an early stage the provincial court judges and the Bar will be included. The final product of the committee could then be adopted by provincial courts and judicial councils and the Canadian Judicial Council. It may be that the Council will wish to leave it to the federally appointed judges in each province to adopt the code with such modifications as they wish. In my view, it would probably be preferable for the Council to adopt it for all the federally appointed judges, but whether they have the authority to do so under the present legislation is not certain.

As with the U.S. codes, it should be made clear that the code is not exhaustive.³ It is therefore not a code in the sense of a civilian code, as a number of Quebec judges pointed out to me. Some organization should take on the task of coordinating the activities of the various rulings on the codes across the country. In the United States, the American Judicature Society established the Center for Judicial Conduct Organizations in 1977. It publishes a very useful document, the "Judicial Conduct Reporter", four times a year. The Center also sponsors a biennial national conference⁴

and special workshops. This task could, for example, be taken on by the National Judicial Institute or the Canadian Institute for the Administration of Justice (C.I.A.J.) in Canada. Rulings by the Canadian Judicial Council and other councils are not now widely known. The Gratton Inquiry's ruling, for example, may never be published, unless the C.J.C. can persuade somebody to do so. A valuable ruling by the Nova Scotia Judicial Council on political donations by judges in Nova Scotia, to give another example, is not known to many other councils, except by chance.

One sensitive topic which the committee will want to consider carefully is financial disclosure. The 1972 A.B.A. Code contained a canon regarding compensation and reimbursement and then provided for public reporting of the activity and the amount received.⁵ The canon is substantially the same in the 1990 A.B.A. Code, which provides that "a judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.... Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity."⁶ The reporting requirement is as follows:⁷

A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

Like the 1972 A.B.A. Code, the 1990 Code applies to those jurisdictions that do not have separate reporting requirements, but observes that many jurisdictions have already developed reporting requirements that are much more comprehensive with respect to what should be reported and to whom.⁸

The U.S. federal Code is similar to the A.B.A.'s Code and requires that "a judge should make required financial disclosures in compliance with applicable statutes and Judicial Conference regulations and directives."⁹ There are two main federal statutes that impose these obligations: the Ethics in Government Act of 1978,¹⁰ dealing with financial disclosure, and the Ethics Reform Act of 1989,¹¹ concerning outside earned income, honoraria, and outside employment. The Acts and the regulations under them are very complex. The instructions under the post-Watergate 1978 Act cover 48 pages.¹² It details what must be contained in the initial and annual reports with respect to certain agreements, reimbursements and gifts, liabilities, income, and transactions. There are, of course, many exceptions and qualifications and the reporting is in many cases in amount bands rather than in specific amounts. Public access is provided to these reports.¹³ The Act is designed "as a means by which actual or potential conflicts of interest may be identified, and thus prevented or remedied."¹⁴

In addition, the 1989 Federal Ethics Reform Act imposes limits on outside earned income. The Commentary to canon 6 of the U.S. federal Code states:¹⁵

The restrictions so imposed include, but are not limited to: (1) a prohibition against receiving “honoraria” (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a 15% limitation on the receipt of “outside earned income.”

The Ethics Reform Act came in at the same time as a 25% increase in judicial salaries.¹⁶ As with the 1978 Ethics in Government Act, the 1989 Act is complex. The Act and the regulations cover 19 pages in the federal Guide to Judiciary Policies and Procedures.¹⁷

How far should Canada go in the direction of financial disclosure and limitation on outside earned income? There appears to be no compelling need in Canada to go too far in these directions at this time, particularly with respect to public disclosure. Outside earned income by judges is not—as far as I am aware—a significant problem in Canada.¹⁸ Still, there should be some reporting and controls. A committee examining the subject might wish to examine the type of non-public reporting done in universities, which requires permission for certain major activities and annual reports to the chair or dean of all paid activities.¹⁹ Similar reports could be made to the appropriate chief justice or chief judge.

Judges deal with issues that can affect stock prices, land values, and other investments. Other persons in similar positions, such as members of securities commissions and cabinet ministers, have a duty to disclose, at least annually, relevant holdings and transactions. Normally, such things as mutual funds, pension funds, and a principal residence would be excluded. In my view, similar reporting should be done by all judges in Canada to the person’s chief and possibly to the person who receives this information from cabinet ministers and others. I do not suggest that it be made publicly available. But someone other than the judge involved should know of the judge’s major commercial and financial transactions. The existence of such disclosure would be one more step in the accountability that the public expects from its public officers. Needless to say, disclosure will rarely, if ever, reveal any impropriety. That is not the purpose of disclosure. Rather, like insider trading laws, it is to give guidance and to deter impropriety. As the U.S. *Report of the National Commission on Judicial Discipline and Removal* states: “Reports of such matters as a judge’s financial holdings and extramural activities can serve a number of purposes, including focusing the judge’s attention on an area of concern and alerting others to the existence of a problem.”²⁰

In my view, it is time for the judiciary in Canada to bring in a code of judicial conduct.

CHAPTER SEVEN: PERFORMANCE EVALUATION

Performance evaluation is a sensitive topic amongst the judiciary in Canada. Whenever I wanted to liven up the conversation in my discussions with judges across the country, I needed only to ask: "What do you think of performance evaluations?" In almost all cases, there was great concern about the issue. In this chapter, we explore whether it would be desirable for the judiciary to undertake some schemes to enable judges to obtain feedback on their performance.

Some judges say that it is not necessary because their judgments are subject to appeal and appeal courts are aware of how they are doing. But in large jurisdictions such as Ontario, with over 500 judges, such awareness is not possible. Appeals from a particular judge will not necessarily be heard by the same panel of judges on each occasion. And there may not be many appeals in total from a particular judge. (Judges can often avoid appeals through their findings of fact or by the sentences they impose.) Moreover, the appeal may not contain a complete transcript, and some of the matters that would cause concern, such as showing up late or acting disrespectfully to a witness, may not appear clearly on a written record. In any event, appeal court judges normally do not consider that it is their task to pass on information about the conduct of another judge unless the situation is very exceptional.

In other parts of society, performance evaluation is a normal part of one's work. This is certainly so in government and business, where annual performance evaluations are standard. In law schools, there is normally an annual assessment of a professor's performance by the dean. This includes looking at student evaluations after each of the professor's courses. Judges, however, are not given probationary appointments or merit increases or, in most cases, promotions, and so, it can be argued, there is not the same necessity for such evaluations. In Germany and France, the judges do have an annual performance review,¹ but that is because in continental countries one progresses up the judicial ladder more than in common-law countries. Judges in Canada therefore miss out on a useful, if sometimes painful, way of knowing how their work is being received by others. How can one achieve this desirable feedback without interfering with judicial independence? Before examining the situation in Canada, let us examine evaluation techniques in the United States and England.

1. THE UNITED STATES

Evaluation of judges started in Alaska in the mid-1970s.¹ The Alaska Judicial Council pioneered the concept in order to obtain reliable information, primarily to help voters make informed decisions in judicial retention elections. Of course, this rationale is not applicable in Canada. New Jersey then started a pilot performance-assessment program

in 1979, which was made permanent in 1986. This was mainly designed to improve judicial performance and not for reelection purposes.² Thus, the New Jersey scheme is potentially applicable to Canada. It may be that the growing use of assessments of judges by outside groups may have pushed interest in the concept. There have been such assessments by magazines in Canada, and there will probably be more as the law of contempt in such cases has been substantially softened.³ No Canadian magazine has gone as far as the article on Dallas judges in 1979, which had this to say about a particular named judge: the judge “is more than just a bad judge; he is a living legend, known far and wide as the worst judge in Dallas county. He is bad on so many different levels it is hard to know where to begin.”⁴ There are now seven states that have formal appraisals and seven are actively developing a programme.⁵ Over half the states have explored the concept.

Some individual U.S. federal judges have on their own initiative voluntarily employed evaluations. One federal judge, for example, after a year on the bench, sent out questionnaires to all the counsel who had appeared before him in the previous year. It was, he said, “solely for my use in attempting to perform my role in our system in the best possible manner.”⁶ Forty-three percent of the lawyers responded. The judge wrote that “if asked in the right way, with a full guarantee of confidentiality, most attorneys will provide thoughtful assessment.”⁷ He did not sense that any of the replies showed a desire by a lawyer “to get even” with the judge. He concluded: “Confidential evaluations performed by judges themselves pose few, if any, threats to judicial independence. In fact, the most universal comment I received was a commendation for asking the attorney’s perception and a request to encourage other judges to do the same.”⁸

The 1993 U.S. National Commission on Discipline and Removal gave its stamp of approval to evaluations, stating: “The Commission recommends that the Judicial Conference and the circuit councils consider programs of judicial evaluation for adoption in the federal courts.”⁹ The Commission stated that “in testimony before and communications to the Commission, lawyers have noted strong interest in the states in a variety of means to provide feedback to judges concerning their performance, conduct, and demeanor.” They noted the use made of evaluations by a chief judge in one circuit. The Chief Judge stated:¹⁰

If there was a complaint that a judge was mistreating witnesses or lawyers, I’d have the judge come to my chambers and sit and talk. We have a useful device, the self evaluation questionnaire. Judges often have a perception of things; they think that everyone loves them. We’d say, “Try this, hand out this questionnaire.” Our better judges do it every several years. The individual judge does it for himself; the completed questionnaire doesn’t go to anyone else. Almost all judges think they gain something from it. Most responses are laudatory, a positive ego feedback. But judges learn that they’re covering their mouth with their hand or picking their nose, and they’re glad to learn of it. But the incorrigible judges haven’t used the questionnaire. They know better. A number of times the self-evaluation questionnaire was the corrective action. It’s

very useful, specific, an easy out for the judge. I can't remember the subsequent feedback from those in specific complaint cases, but in general the vast majority thought it was useful.

In 1985, the American Bar Association produced a detailed report on the subject, "Guidelines for the Evaluation of Judicial Performance"¹¹. The Report referred to the growth of evaluations done by the bar and the media, but which "have too often suffered from biases, from sensationalism, from lack of appropriate weighting, from politics, from massive infusions of hearsay, and from other defects."¹² The key goal of evaluation, they stated, is judicial self-improvement.¹³ They cite as an example the New Jersey programme, where the primary objective is "to develop and capture reliable information concerning judicial performance of individual judges to the end that judges can gain needed insight into their performance and to improve that performance accordingly."¹⁴ Nevertheless, they acknowledge that some jurisdictions may choose to use the evaluations for other purposes, and they list: "(a) The effective assignment and use of judges within the judiciary, (b) the improved design and content of continuing judicial education programs, and (c) the retention or continuation of judges in office."¹⁵ The guidelines, they stress, are "not principles to be invoked to discipline a particular judge."¹⁶

The responsibility for initiating a judicial evaluation programme, they acknowledge, rests with the judiciary.¹⁷ The administration of the evaluation process, the guidelines state, should "operate through an agency or committee that is broadly based and composed of persons of independent quality drawn from the bench, the bar, and non-lawyers familiar with the judicial system."¹⁸ The criteria would look at such matters as the appearance of impartiality, knowledge and understanding of the law, communication skills, preparation, attentiveness, punctuality, and control over the proceedings.¹⁹ The programme, they urge, "should remain flexible"²⁰. Multiple sources for obtaining information should be used, and they would include such sources as "lawyers, other judges, public records, court personnel, litigants, and other appropriate sources." The source of the information should, of course, be kept confidential.²¹ The individual judge and the presiding or assignment judge should receive complete results and supporting data concerning the individual judge.²² They recognize, however, that some jurisdictions will release the data in a summary form to the public. This is now done in New Jersey and Connecticut.²³

The New Jersey and Connecticut models are not linked to the election process and thus offer some guidance to Canadian jurisdictions.²⁴ Other states, such as Alaska and Colorado, have retention elections for the judiciary and this fact tends to drive their evaluation process.²⁵

New Jersey's programme, which started on a pilot basis in 1979, relies primarily on questionnaires filled in by lawyers who have had full trials or have had a high volume of other proceedings before the judge. A Judicial Performance Commission, consisting of six retired judges, guides judges in assimilating the results of their evaluations. Since 1990, videotaping court proceedings has been part of the process. A communications

expert analyses the judges' verbal and nonverbal behaviour, including the judge's control in interactions with people in court and the judge's style in posing questions, gathering facts, and considering information. "Judges find the process a revealing and useful tool for self-improvement", states one recent article.²⁶

Connecticut's programme, which started in 1984, also uses questionnaires. In addition, jurors are surveyed. The response rate is surprisingly high. Over a two-year period, about two-thirds of the roughly 4,000 lawyers and 3,000 jurors who had been sent questionnaires responded. Normally a response of at least 25 lawyers for a judge is required before the sample is deemed adequate. Positive responses were received for superior court judges in all categories of judicial performance evaluation, and "very few were inflammatory or intemperate."²⁷ Most judges, states a retired Connecticut judge in an article written with the participation of the chief justice and the chief court administrator, find the information helpful.²⁸

2. ENGLAND

There is relatively little discussion of the subject in the English sources. But there are indications that some knowledgeable groups wish to introduce greater evaluation procedures for the judiciary. The important 1992 Report by Justice, *The Judiciary in England and Wales*, states:¹

We are also concerned at the absence of any arrangements for monitoring quality and behaviour. These are needed to identify those who should be considered for promotion. They are also needed to ensure that judges receive feedback on their performance—not on the correctness of their decisions, that is the work of appeal courts—but on the way in which they conduct themselves so as to secure a fair trial. Unless judges know where they are going wrong they cannot improve what they do.

The 1992 Royal Commission on Criminal Justice made similar observations, recommending that "the judiciary as a profession should have in place an effective formal system of performance appraisal."² The Commission went on to state:³

Presiding and resident judges should in our view have the leading roles to play in such a system. They already undertake a form of judicial assessment, since decisions have to be made as to which judges are suitable to hear certain types of case or to act as deputy High Court judges. But we would like to see time found for resident judges to attend trials so that they can assess the performance of judges in their courts. Alternatively or additionally, recently retired judges could fulfil this function, possibly under the auspices of the Judicial Studies Board. Their findings should be made known to the judge being assessed and possibly to the presiding judge. The findings should be kept within the judiciary, in order not to put at risk their independence.

Lord Taylor, the Lord Chief Justice, publicly expressed his unhappiness with this recommendation, stating that “to introduce formal performance appraisal such as may be appropriate in industry or the Civil Service, would clearly endanger the fundamental independence of individual judges not only from the executive, but also...from each other.”⁴

3. CANADA

Canada has been cautious about bringing in any form of evaluation. The Nova Scotia judiciary has, however, been actively exploring the concept. The idea was discussed in 1991 by the Administration of Justice Committee of the Nova Scotia Barristers’ Society.¹ Subsequently, the judiciary invited a justice of the New Jersey Supreme Court to come to Nova Scotia to discuss the procedures in his state. Needless to say, there are mixed views amongst members of the Nova Scotia judiciary on the idea and they are proceeding with great care on a pilot project. At the time this is being written, a pilot project is being developed by a judicial committee with the help of Professor Dale Poel of the School of Public Administration of Dalhousie University, an expert on performance evaluation. The pilot project has not yet been publicly announced, although it has been made known to the Barristers’ Society and the Canadian Bar Association and requests for funding have been initiated. It is likely to borrow heavily from the New Jersey programme discussed below.

Ontario specifically included the possibility of performance evaluation in its 1993 legislation relating to the provincial court. Section 51.11 of the Act states:²

51.11 — (1) The Chief Judge of the Provincial Division may establish a program of performance evaluation for provincial judges, and may implement the program when it has been reviewed and approved by the Judicial Council.

(2) The Chief Judge shall make the existence of the program of performance evaluation public when it has been approved by the Judicial Council.

(3) The following are among the goals that the Chief Judge may seek to achieve by establishing a program of performance evaluation for judges:

1. Enhancing the performance of individual judges and of judges in general.
2. Identifying continuing education needs.
3. Assisting in the assignment of judges.
4. Identifying potential for professional development.

(4) In a judge's performance evaluation, a decision made in a particular case shall not be considered.

(5) A judge's performance evaluation is confidential and shall be disclosed only to the judge, his or her regional senior judge, and the person or persons conducting the evaluation.

(6) A judge's performance evaluation shall not be admitted in evidence before the Judicial Council or any court or other tribunal unless the judge consents.

(7) Subsections (5) and (6) apply to everything contained in the judge's performance evaluation and to all information collected in connection with the evaluation.

The programme is not mandatory. The section says "may establish". It is also clear that it is the judiciary that is to develop the scheme. It is the Chief Judge who establishes it, although it requires the approval of the Judicial Council.

The goals of the Ontario legislation are similar to those found in such states as New Jersey and Connecticut.³ Subsection 5 states that the evaluation shall be confidential and may be disclosed only to the judge, his or her regional senior judge, and the person conducting the evaluation. The regional senior judge would be able to use the information in the assignment of judges. As yet, no public document on evaluation by the Ontario provincial judges has appeared.

Mr. Justice Zuber's 1987 report on Ontario courts had earlier recommended such evaluations: "It is recommended," he wrote, "that the judiciary undertake a periodic, systematic evaluation of the performance of judges with a view to aiding judges to improve their performance and aiding the senior members of the judiciary in the assignment of judges."⁴ Zuber stated:⁵

In the interest of providing the best possible service to the public, it should be possible to devise a confidential system of evaluation of judicial performance to be administered by the senior officers of the judiciary. This could include questionnaires to be filled out anonymously by members of the bar who have appeared before a judge. The purpose of the evaluation would be to identify the strengths and weaknesses of particular judges and to enable those judges to work on their weaknesses and enhance their strengths. These evaluations would also permit a regional associate chief judge to make best use of the judicial resources at his or her disposal for the benefit of the public.

The Manitoba Law Reform Commission in its 1989 Report on The Independence of Provincial Judges also recommended "that a judicial evaluation program be established for the judges of the Provincial Court of Manitoba", starting with "a pilot program, concentrating on recently appointed judges."⁶ The Commission was impressed with

the New Jersey scheme. Such a programme not only would "enhance the judicial system through the improvement of the performance of judges on an individual and institutional basis," the Commission stated, but also would improve public confidence in the judiciary. The Commission then carefully explored a number of the important questions:⁷

Who should be responsible for judicial evaluation?

Who should actually carry out the evaluation?

From what sources should the information be gathered?

How should the information be collected?

How frequently should information be collected?

What use should be made of the data collected?

Unlike the Ontario programme, which would be run by the judiciary, the Manitoba programme would be run by a Judicial Performance Committee composed of two persons named by the provincial judges and three persons named by the Cabinet. Taking control of the development and supervision of the programme out of the hands of the judiciary will inevitably lead to some suspicion amongst the judiciary and a reluctance to participate. No scheme has yet been proposed in Manitoba. Exploration of the issues has begun by the Canadian Association of Provincial Court Judges.⁸

4. CONCLUSION

What can we conclude from this survey? In my view, some form of periodic evaluation of how trial judges conduct proceedings would enhance the effectiveness of future proceedings. (Court of appeal judges are constantly being evaluated by their colleagues.) Student evaluations were introduced into most Canadian universities over twenty years ago. They were first undertaken by students and then in many cases taken over by the faculty. There are multiple purposes for evaluations in the universities, some of which, such as assisting students in course selection and chairs and deans in awarding merit pay, are not applicable to the judiciary. But the major reason for evaluations—giving the professor feedback on his or her teaching methods—is applicable, if one substitutes judging for teaching.

I believe that most professors now consider that, despite the normal apprehension about any form of evaluation, the present system is beneficial. There is no question that administrators believe that it is desirable. It goes some way to ensure that professors are prepared for class, do not cancel too many classes, keep up on their subject, treat students with respect, and generally think about how to be an effective teacher.

Moreover, an objective survey is a useful counterweight to rumour and the harmful effect of even one individual vocal complainant. Thus, evaluations can be a source of protection for professors. It is true that professors are concerned about what they say in class on sensitive subjects. But this will be so whether or not there are evaluations. Indeed, because a number of people are surveyed, evaluations might make it less likely that a professor will unnecessarily shy away from controversial areas. In the Faculty of Law at the University of Toronto—and I believe this is true at most other law schools—the evaluation process is conducted by the administration of the faculty, and the forms and procedures are determined by Faculty Council. Evaluations are taken very seriously by virtually all faculty members.

Evaluations would be most effective for the judiciary if they were designed and administered by the judiciary. The new Ontario legislation is thus better than that proposed by the Manitoba Law Reform Commission, which would have the evaluations run by a cabinet-dominated board. It would be wise to involve lawyers and lay persons in the design of the programme. Law professors might be particularly useful to include. The American Bar Association involved Professor Geoffrey Hazard, Jr., of Yale University in its study, and Connecticut included the Dean of the Yale Law School on its committee.

Manitoba was wise in recommending an incremental approach. No doubt each jurisdiction—and courts within each jurisdiction—will handle the various questions involved in evaluations somewhat differently. I will not—and cannot—set out a blueprint. There are a variety of techniques that could be used. The standard technique—and in my view the most desirable—is to get the opinion of lawyers who have appeared before the judge over a period of time. Perhaps one wants to wait a short period of time before sending the questionnaire to help ensure that the losing lawyer's reaction is not given in the heat of defeat. The longer the delay, however, the less accurate the perception will be. New Jersey hands out the forms to lawyers at the end of the trial, and it is said the practice does not cause problems.

Evaluations could take place every few years, or oftener if the judge wished. Some American jurisdictions, such as Connecticut, also send questionnaires to jurors. There are probably not enough jury trials in Canada to make this a viable approach. Is there a substitute group one could survey: witnesses, court officials, members of agencies such as the Children's Aid Society and Salvation Army? Another group—indeed, the most important group—are the litigants. Whether this would produce useful information for the judge is uncertain, but it would produce useful information on perceptions of the justice system, including areas over which the judge has no control. Perhaps the collection of this information should be done by a system unconnected with judicial evaluation.

To whom should the evaluations go? Perhaps, at least in the short run, they should go only to the individual judge. There should, however, be some obligation for the judge to discuss the results with someone, perhaps selected by the judge from a defined group

of respected judges or former judges. The chief judge and regional senior judges should perhaps also be included in the group from which the judge can choose.

The judge should, however, be able to make whatever use of the evaluations he or she wishes. A judge who is unhappy with his or her assignments could use the evaluations to help the judge get what the judge considers more desirable assignments. A judge seeking an appointment from, say, the provincial bench to the superior court could ask that the evaluations be sent to the appropriate committee. As will be discussed in a later chapter, it should probably be standard practice to obtain some form of evaluation before an elevation is considered. If evaluations are to be used by the judge for other purposes, it would be necessary to keep complete, confidential copies of them in the court office. Summaries of evaluations of a number of judges, without identification of the judges involved, should be made available to persons handling judicial education for use in developing education programmes.

The evaluations should not, of course, be used for disciplinary purposes. I agree with the new Ontario legislation, which states: "A judge's performance evaluation is confidential" and "shall not be admitted in evidence before the Judicial Council or any court or other tribunal unless the judge consents."¹

Should other judges visit the courtroom of another judge, as suggested by the English Royal Commission? This would understandably worry judges. The visitor on a particular day might be stepping into an atypical situation. Moreover, the very presence of the observer, if known, would affect the judge's performance, and, if not known, would cause constant anxiety. This technique might be workable in some situations, however, depending on who sits in on the judge. But something less threatening might be more effective. In the Faculty of Law at the University of Toronto in the 1970s, we made available to all faculty members the services of a psychologist with expertise in teaching methods. The person would be invited into a number of the professor's classes and would then discuss with groups of students what they liked about the course and the ways that the classes could be made more effective. As the then dean, I really had no choice but to invite the person into my own classes. The feedback I obtained was extremely valuable. I learned about certain things I did that were effective and things that were not. It was a valuable experience.

There are many forms of feedback that could be explored apart from those mentioned here. Videotaping a complete trial, as now used in New Jersey, or reviewing transcripts, could also be looked at. Another technique is to institute a bench and bar committee that will channel concerns about individual judges to the chief judge, who may pass it on to the judge concerned. This was discussed in the chapter on discipline. The English Royal Commission on Criminal Justice made such a recommendation, stating: "We also recommend that systematic procedures be adopted whereby the views of members of the Bar on the performance of judges can be channelled, through the leader of the circuit and the Chairman of the Criminal Bar Association, to the resident or presiding judge and then to the judge concerned. The fact that such systems existed could help to improve public confidence in the judiciary."² There are a number of

such committees in Canada, some more active than others. The Law Society of Alberta, for example, recently activated a Bench/Bar Committee, first established in 1991. The Committee is to handle concerns about the judiciary as well as concerns about members of the Law Society. The guidelines state:³

1. The Committee will consist of Law Society members who should reflect a cross-section of the Bar.
2. The Committee will receive and review concerns raised by lawyers about judges, screening out any which are trifling or isolated.
3. The Committee will pass on to the appropriate Chief Justice or Chief Judge the concerns that have been raised and reviewed.
4. There will be no requirement that the Chief Justice or Chief Judge in question do more than receive the complaint and act on it in his or her own discretion.
5. The Committee will also receive information about judges' concerns about lawyers from the Chief Justice or Chief Judge (or his or her designate) and will pass on the relevant information to the Law Society or otherwise deal with it as appropriate.
6. The Committee will in no way act as a disciplinary body, but only as a pipeline for information.
7. Confidentiality of complaints and those complained of will be maintained within the confines of the complaints system.

Some form of evaluation should be explored by the judiciary. It is hard to understand why a responsible member of the judiciary would not want to have intelligent feedback on how his or her actions are perceived by others. As Professor Peter Russell has stated: "a well-conceived system of performance review could serve Canadians' interests in building a judiciary that is both more professional and more accountable—and do so without endangering the judicial independence essential to a liberal democracy."⁴

CHAPTER EIGHT: JUDICIAL EDUCATION

1. INTRODUCTION

Judges appointed to the bench in Canada need to keep up with changes in the law, techniques of running an efficient court, and the changing nature of society. As the 1985 Canadian Bar Association's study on judicial independence stated: "Competence in the discharge of judicial duties is an important factor in the public's support of an independent judiciary."¹ Further, effective judicial education will decrease the need for disciplining members of the judiciary. Chief Justice Lamer recently put it this way: "The independence conferred upon judges is a great responsibility. It requires a judge be as well trained as is possible."² The vast majority of judges throughout Canada support these views, whatever the position might have been in the past. Mr. Justice Frank Iacobucci, the Vice-Chair of the Board of Governors of the National Judicial Institute, stated recently: "We believe that innovative and effective judicial education is crucial to maintaining and enhancing the independence of the judiciary....We know that judges require education in a balanced mix of substantive law, skills training and social context education."³

It is the "social context education" issue that has been the subject of controversy in the past few years. A number of judges across the country, however, told me that it is important for judges not to become too isolated from the community and thus lose touch with what is happening in society. U.S. Federal Judge Jack Weinstein put it well in a recent speech:⁴

We hope that after appointment judges will continue to enhance their understanding of the world...As generalists as well as specialists, judges need to continue to acquire new information—much as any intelligent, well-educated person does—by reading newspapers, magazines, and books, watching television and listening to radio, taking adult education and formal college courses, attending lectures and seminars, and talking to friends and family. Judges cannot make accurate findings of fact or evaluate the effect of their decisions unless they have some understanding of society.

Former Supreme Court of Canada judge, the Honourable Bertha Wilson's 1993 Report on Gender Equality in the Legal Profession, *Touchstones for Change*, referred to the need for judicial education on the issues of sexism and racism and recommended that "sensitivity courses for judges on gender and racial bias be made compulsory not only for newly appointed judges but for all judges."⁵ This aspect of the report struck a sensitive nerve in the judicial body. Many judges objected to the fact that the Task Force recommended compulsory courses. The Canadian Judges Conference wrote to the President of the Canadian Bar Association, stating: "We have always been opposed to any form of compulsory education that might tend to influence the mind of a judge in one direction rather than another..."⁶ Chief Justice McEachern put it this way in

the Annual Report of the British Columbia Court of Appeal: "Any form of mandatory education about controversial subjects that may come before the Court may appear to disturb the neutrality the Court regards as essential to the proper disposition of the Court's business...Such a requirement would be contrary to constitutional practice and completely unacceptable to the judiciary."⁷ One female Alberta judge told a reporter that making such courses mandatory would be counterproductive: "I think you get a better response," she said, "if you don't try to make the horse drink."⁸ And the then minister of justice, Pierre Blais, agreed that whether such courses should be compulsory "should be left up to the judges."⁹

As a result of these objections, the Canadian Bar Association at its midwinter meeting in 1994 softened the education resolution by leaving out the issue of whether the education should be compulsory. At the same time, it added a preamble recognizing the principle of judicial independence. The revised resolution stated: "Recognizing the principle of judicial independence, the Canadian Bar Association recommends that the judiciary assume the responsibility to educate itself regarding the social context in which judicial decision-making takes place, including gender and racial issues."¹⁰

The resolution also clarified the other main concern, that is, that the original resolution did not make it clear that the programmes were to be conducted by the judiciary themselves. The Hon. Bertha Wilson had acknowledged in her Report that "if there is any legitimacy to the concern over judicial independence, the training can be provided exclusively by judges themselves."¹¹ Cecilia Johnstone, the president of the Canadian Bar Association, apparently with Bertha Wilson's support, accepted the new resolution, but warned that the Bar Association would be watching how the judiciary dealt with the issue: "We're going to monitor it and see how they're approaching it. If we don't see progress made, this may come back on the floor of council."¹²

The Wilson Report certainly spurred the judges to increase their efforts with respect to awareness of gender, racial, and other issues. The Canadian Judges Conference wrote to the Canadian Judicial Council in early 1994, stating: "comprehensive judicial education, including courses on the awareness of gender, racial bias, and other emerging social issues should be made available to all newly appointed judges, and...continuing education, including the above subjects, should be made available to all section 96 judges."¹³ And in March, 1994, the Canadian Judicial Council passed a unanimous resolution calling for the establishment of "comprehensive, in depth and credible education programs" relating to social issues, including gender and race.¹⁴ Some members of the Council had been pressing hard for such programmes. Chief Justice Catherine Fraser of Alberta in several public speeches stated: "as I have said before, and wish to stress again, judicial independence should not be used as justification for judicial isolation or lack of awareness of social issues."¹⁵ The programmes, which will also be available to provincial court judges, will be run by the National Judicial Institute and will travel to the various courts.

2. NATIONAL JUDICIAL INSTITUTE AND OTHER ORGANIZATIONS

The National Judicial Institute was established in 1988.¹ Originally called the Canadian Judicial Centre, the name was later changed because of confusion with the Canadian Judicial Council. The establishment of the Institute, funded by both the federal and the provincial governments, followed the model recommended in the 1986 Stevenson Report.² William Stevenson, then a member of the Alberta Court of Appeal and later of the Supreme Court of Canada, was asked to undertake a study on judicial education by the Chief Justice of Canada and the Minister of Justice. He concluded that "existing Canadian programmes show uneven coverage with significant gaps and deficiencies, duplication, and a lack of coordination with a consequent waste of resources."³ He therefore recommended "a permanent, professionally operated, bilingual resources facility for judicial education in Canada."⁴ Stevenson also concluded that "considerations of judicial independence require direction to remain with the judiciary."⁵

A six-person Board was established, drawn entirely from the provincially and the federally appointed judiciary. Further, the Executive Director was to be and has been a judge. The first director was a federally appointed judge and the present director is a provincially appointed one.⁶ The Institute has a full-time staff of about twelve persons and an annual budget of approximately half a million dollars (not including judicial travel costs). The budget is supposed to be shared 50-50 between the federal government and the provinces, but two provinces (Quebec and Manitoba) have unfortunately not been contributing to the Centre.

The Institute has been very active. It runs about 40 programmes a year, involving over 1,000 judges. In the spring of 1994, it ran a two-week intensive course on criminal law, attended by 26 federally appointed and 33 provincially appointed judges.⁷ The programmes are in three main areas: substantive law, skills training, and social issues. The mandate of the Institute is as follows:⁸

To foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth;

To engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary;

Thereby improving the administration of justice.

In a speech in August, 1994, Chief Justice Lamer, the chair of the Institute, outlined the activities of the Institute in relation to social awareness:⁹

The Institute has high quality training videos in the areas of family violence, child abuse, gender bias and race relations. Every newly appointed judge in Canada receives an orientation kit from the Institute which includes videos on gender equality and race relations. These topics are addressed in the Institute's courses on early orientation for newly appointed judges. The Institute also offers programs on family violence and child sexual abuse which have been attended by a large number of judges at a variety of locations across Canada. Over and above the material and training for newly appointed judges, approximately two thirds of the federally appointed judiciary have participated in gender equality training through programs organized by the Institute. More than half have participated in programs dealing with cultural awareness. These numbers are going up almost every month. Since 1990, race and/or gender issues have been dealt with in twenty courses offered by the Institute.

There are, of course, a number of other organizations in Canada offering judicial education courses. I will discuss only two of them, the Canadian Institute for the Administration of Justice and the Western Judicial Education Centre. A number of individual courts also run their own successful education programmes. And until the establishment of the National Judicial Institute, the Canadian Judicial Council was heavily involved in judicial education.¹⁰

Since its inception in 1975, the Canadian Institute for the Administration of Justice has focused considerable attention on judicial education for all judges.¹¹ They have organized courses for new judges, seminars on the Charter, judgment writing, and other topics. Some of these were developed for the Canadian Judicial Council. The C.I.A.J. has proven to be a successful organizer of such courses. In 1979, the C.I.A.J. proposed the creation of an education and research centre under its aegis, but after a series of studies,¹² including the Stevenson Report, the Canadian Judicial Centre, now the National Judicial Institute, was established.

Another successful organization is the Western Judicial Education Centre. The Centre was established for western provincial court judges in 1984.¹³ It was a project of the Canadian Association of Provincial Court Judges, which had been sponsoring training sessions for newly appointed provincial court judges since the mid-1970s.¹⁴ The Centre's workshop series relating to social issues has been described in a comprehensive evaluation study done for the Federal Department of Justice in 1991 by an American expert on such courses as "extraordinarily successful."¹⁵ The gender equality programme, developed with the help of Dean Lynn Smith through a secondment arrangement, is considered by knowledgeable observers, including a number of persons involved in judicial education whom I met in England, as a model programme.

3. CONCLUSION

Judicial education in Canada has been taken seriously by the judiciary. The judiciary has developed a large number of programmes on substantive issues and skills training. And prodded by the 1993 Canadian Bar Association's Report on Gender Equality in the Legal Profession (the Wilson Report), the judiciary has been making further efforts at developing programmes on gender, racial, and other social awareness issues. Canada seems to be ahead of England in this area. The 1993 British Royal Commission on Criminal Justice indicated only very modest progress on gender issues stating: "Consideration should also be given to extending [race] training to awareness of gender issues."¹ In other areas, however, there has been considerable development of judicial education in England.² Unfortunately, I have not had the time to survey judicial education in the United States, where there has been considerable activity. In a letter to me, one knowledgeable senior provincial official expressed concern about the resources in Canada for judicial education, compared to the United States:³

With regard to judicial education, there is little doubt that this area requires a review and a consolidation of resources and efforts. In Canada, you have the National Judicial Institute with a \$500,000 budget. In the United States, you have the State Justice Institute run by the State Chief Justices with a budget of \$14.5 million, and the Federal Judicial Center with a budget today of over \$17 million and a permanent staff of well over 100 persons. This does not include the very significant budget of the National Center for State Courts, the Institute of Court Management, the National Association of Court Managers, or the Conference of State Court Administrators. Canada is so far behind the United States in terms of consolidating its resources and providing some concentrated effort as to not even be in the race.

I do not feel particularly competent to discuss the most effective way of delivering such programmes. Dean Lynn Smith of U.B.C., who has worked on gender equality courses for over seven years, recently offered some sound advice to the Canadian Judicial Council's Special Committee on Equality in the Courts, which is considering how best to develop programmes. For example, in dealing with the issue of making the courses credible to the judges, Dean Smith stated:⁴

Credibility among judges, to a considerable extent, turns on the extent of judicial leadership. If there are not highly credible judicial leaders of the program, it can almost become a waste of time, with academics or representatives of the community speaking on issues which may receive polite attention but little engagement. On the other hand, where there is strong and committed judicial leadership, the same presentations are likely to be seriously considered, since the door has been opened and the legitimacy of the topics acknowledged. It is important for the emphasis to be on judges working with judges to enhance what is already a central goal for the judiciary in its work — a legal system characterized by fairness and equality. Academics or

community representatives can be of assistance in that process not as spokespersons for “interest groups” but as persons knowledgeable about the areas which the judges have themselves identified as potentially problematic.

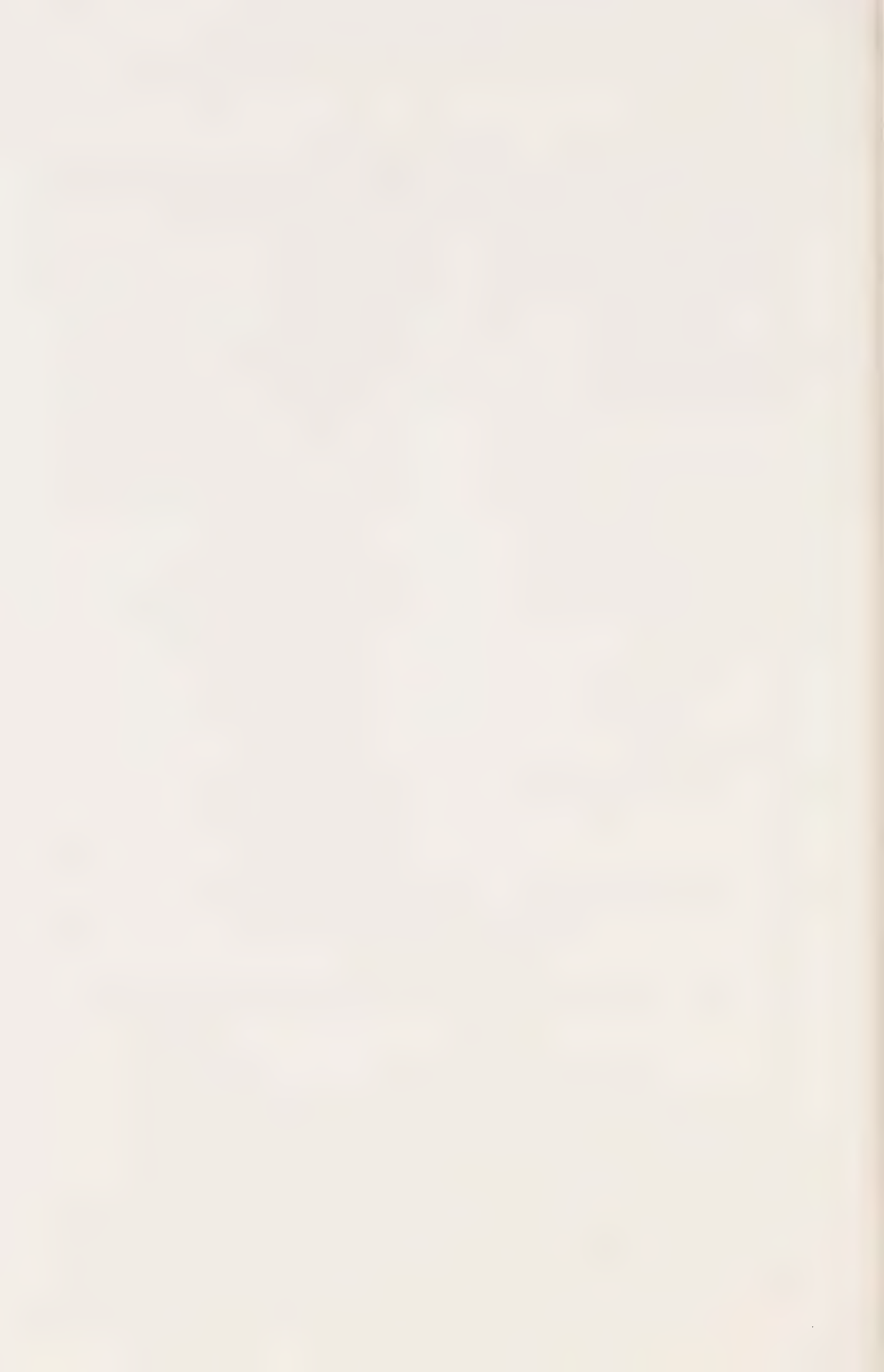
As well, credibility among judges depends upon bringing in people who know the law in relevant areas in such detail and depth that they can put forward not only excellent insights into the problems but also constructive suggestions for reform. For most judges to find the program worthwhile, they must leave with some insights and practical guidance in doing their work. Therefore, programs should focus on the areas that matter most to the judges, such as those in which large numbers of cases come before them, and faculty should address issues in concrete and practical ways.

The ways in which the programming is presented can greatly affect its credibility among judges:

- (1) the faculty should be diverse demographically if possible, and should include some respected judges as well as other experts. All faculty members should be skilful, experienced and knowledgeable in the relevant areas;
- (2) the programs should be well planned, with participation by the faculty in that process;
- (3) the programs should be well structured, with ample opportunity for judges to exchange ideas and discuss their own experiences;
- (4) the programs, and the process as a whole, should look to the future and not at allocating blame for the past, and should be realistic about the judiciary’s power to change social conditions;
- (5) presentations by those who preach should be avoided, as should presentations by those who lack understanding of the subject-matter;
- (6) confidentiality for participants should be a principle that is understood — judges should be able to feel safe, during the programs and the process as a whole, that they can express their ideas without subsequent publicity.

The National Judicial Institute’s 1992 Standards for Judicial Education in Canada recommended that “every new judge should undertake approximately ten days of intensive judicial education as soon as possible after appointment” and thereafter “approximately ten days per calendar year attending judicial education programs relating to the judge’s responsibilities or court assignment.”⁵ Whether the Institute

will be able to obtain funding to achieve that reasonable objective remains to be seen. The Institute's 1993 document produced by its Board, "Towards the Year 2000", is not optimistic about increases in funding—at least in the short run: "The Board recognizes that, given the current fiscal climate, it is probably unrealistic to request an increase in the level of core funding."⁶ One serious concern is funding travel costs for provincially appointed judges.⁷ To this writer, the initial ten days of judicial education for newly appointed judges seems very low.⁸ Apparently, Kim Campbell, the then minister of justice, and Chief Justice Lamer were discussing in late 1992 the idea of allocating four to six weeks of education for new judges before they assume their duties.⁹ Perhaps when financial conditions improve, this idea will be resurrected.



CHAPTER NINE: ADMINISTERING THE COURT SYSTEM

1. INTRODUCTION

Who should have the responsibility for administering the court system, the government or the judiciary? In the United States, the federal and most state judicial systems are run by the judiciary.¹ Many Canadian judges wish to have the same administrative independence. They—and others—say that the present system, in which the courts in each province and territory are, in general, run by the attorney general's department, creates tension and friction. There is, it is said, an "inherent conflict"² when the courts are run by the department that is the chief litigator before the courts. There are also "conflicting loyalties"³ when the staff is subject to direction by the judiciary and the attorney general's department.

In this part, we will look at the present situation in Canada and in some other common-law countries (England, the United States, and Australia). We will also examine various reports that recommend changes and look at other Canadian institutions that enjoy a measure of autonomy. Finally, a number of possible options will be explored.

The issue of whether administrative autonomy for the courts is required under section 11(d) of the Charter was considered in *Valente*.⁴ Section 11(d), it will be recalled, states that a person "charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Ontario Provincial Court judges were not "independent", claimed the defendant, *Valente*. Chief Justice Howland, giving the judgment for the Ontario Court of Appeal, held that independence was constitutionally required with respect to adjudication, but not for administration. Howland C.J.O. stated:⁵

In Ontario, the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the court-rooms and the court staff. The assignment of judges, the sittings of the court, and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudicative function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls.

The Supreme Court of Canada agreed with Howland.⁶ Le Dain J. stated for a unanimous Court that an "essential condition of judicial independence for purposes of s.11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function." Howland C.J.O.'s list of matters that must be under judicial control was endorsed by Le Dain J.:⁸

Judicial control over the matters referred to by Howland C.J.O.—assignment of judges, sittings of the court and court lists—as well as the related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or “collective” independence.

The judgment was released in late 1985 at a time when there was considerable agitation to implement the 1981 Deschênes Report, *Masters in their own House*,⁹ which had recommended the independent judicial administration of the courts. “The degree to which the judiciary should ideally have control over the administration of the courts,” Le Dain observed, “is a major issue with respect to judicial independence today.”¹⁰ Le Dain J. pointed out that Chief Justices Laskin and Dickson both had argued for greater administrative independence.¹¹ Laskin C.J.C. had stated in a speech in 1980: “Coming now to other elements which I regard as desirable supports for judicial independence, I count among them independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the Courts but also the appointment and supervision of the supporting staff.”¹² And Dickson C.J.C. stated in a 1985 speech to the Canadian Bar Association: “Preparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice.”¹³ Le Dain J. stated for the Court—and the Court included Dickson C.J.C.—that although an “increased measure of administrative autonomy...may well be highly desirable, it cannot...be regarded as essential for purposes of s.11(d) of the Charter.”¹⁴

Later judgments by the Supreme Court of Canada, however, open up scope for further interpretation of *Valente*. The following year, in *Beauregard*, Dickson C.J.C. stated that “the principle of judicial independence has grown and been transformed to respond to the modern needs and problems of free and democratic societies...The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system.”¹⁵ And in *MacKeigan v. Hickman*, Cory J. also noted the evolving nature of judicial independence and stated that “the privilege relating to administrative functions is an adjunct to the adjudicative privilege...[J]udicial independence may not necessarily be compromised by all executive or legislative action which affects the administration of the courts.”¹⁶ So there may, in his view, be executive actions that do affect judicial independence. The so-called administrative privilege, he goes on to state, “is not as vital to the integrity of the administration of justice as is the adjudicative privilege. It is appropriate that the administrative privilege be qualified and limited in its scope.”¹⁷

Is greater administrative independence desirable as a matter of good administration, even though it may not be constitutionally necessary? In my view, a way should be found to give the judiciary greater control over the running of the courts. Professor Garry Watson put it this way in 1976 in arguing for a cooperative model:¹⁸

Modern management theory and practice recognize that you cannot employ highly qualified professionals and give them roles that are devoid of any say in setting and meeting the goals of the job and expect them to be satisfied in their work. I suggest that this is one of the real reasons why judges are asking for a greater role in court administration than the executive, at times, seems prepared to accord the judiciary. I suggest that a sound co-operative model of court administration should — as a matter of sound management practice — afford the judiciary a meaningful say in the organization and operation of their work environment.

Lawyers coming to the bench from the practice of law are often frustrated by their inability to control their work environment. In their law firms, they made the usual tradeoffs between various possible expenditures, such as computers versus secretarial assistance. Law schools certainly have great control over these types of decisions. Judges, for the most part, do not. As stated in Osborne and Gaebler's book *Reinventing Government*, "people work harder and invest more of their creativity when they control their own work."¹⁹

Let us turn to existing situations in the Canadian courts.

2. THE FEDERALLY-ESTABLISHED COURTS

Under Section 101 of the Constitution Act,¹ the federal government can establish its own courts "for the better Administration of the Laws of Canada" and "a General Court of Appeal for Canada." In 1875, the Supreme Court of Canada was established,² and in 1970 the Federal Court of Canada³ replaced the former Exchequer Court of Canada, which had been set up in 1875.⁴ The third federally established court, the Tax Court of Canada, was created in 1980.⁵ The administrative structure of each court is established through a combination of the constituent statute, the Judges Act,⁶ and the Financial Administration Act.⁷

Until 1976, these courts were administered by a branch of the federal Department of Justice. In 1977, the Judges Act was amended to give the federal courts greater autonomy.⁸ The Registrar of the Supreme Court became the Deputy Head of the Court, and the Court became an agency, similar to a small department. A Commissioner for Federal Judicial Affairs was also established to act as a buffer between the Federal Court (and later, the Tax Court) and the Department of Justice. At the same time, the Commissioner was given responsibility for all administrative affairs in respect of federally appointed judges.

The minister of justice, Ron Basford, told the House on second reading of the amending Act in May, 1977:⁹

Since I became Minister of Justice I have been deeply concerned about the degree of my department's involvement in the administration of judicial affairs. I believe that since the Department of Justice is responsible for the conduct of the government's litigation, it is preferable that the courts should not have to rely on the department for handling its administrative affairs. Again, it is a principle of independence of the judiciary.

To remove the anomaly which currently exists—the anomaly of my department and my counsel often being the principal litigants before a court and also handling the administrative affairs of that court—I am recommending in this bill measures that will transfer from my department its administrative responsibilities for the federal courts and federally-appointed judges. At the same time, we preserve the principle of ministerial responsibility to parliament for the expenditure of public funds.

The Registrar of the Supreme Court and the Commissioner for Federal Judicial Affairs would continue to seek funds through the Minister of Justice, the Treasury Board, the Cabinet, any parliamentary committee, and eventually, Parliament. They would prepare budget submissions and supervise the court employees, but whereas the Commissioner was to act under the Minister of Justice,¹⁰ the Registrar of the Supreme Court was to act under the direction and supervision of the Chief Justice of Canada.¹¹ In relation to the Federal Court, the Commissioner's duties are to be carried out by a deputy of the Commissioner (called the Administrator of the Federal Court) appointed by the Commissioner with the concurrence of the Chief Justice and the Associate Chief Justice of the Federal Court.¹² In law, the Administrator of the Federal Court does not act under the direction and supervision of the Chief Justice, although in practice he or she does.¹³

The relationship between the Supreme Court of Canada and the Department of Justice continued to cause friction. The 1985 Canadian Bar Association Report on the Independence of the Judiciary stated:¹⁴

It was hoped that this measure [the 1977 legislation] would provide the needed separation between the Supreme Court and the Department of Justice. However, the results of this initiative have been disappointing. While the court was separated to some extent from the Department of Justice, the influence of other parts of government has been all the more pronounced. In effect, then, one facet of government has merely been replaced by another.

The Report quotes a former Registrar of the Supreme Court as follows:¹⁵

The provisions of Bill C-50 have in fact created the Court as another department of the government, a department which reports through the Minister of Justice. As a result, the Court is subject to all the policies and practices of the government on employment, purchasing, contracting, accommodation and

financial management. Thus the Court is exposed to all the processes of government when it in fact is supposed to be separate from government.

They therefore recommended that the Supreme Court be cut loose from general government regulations, in particular the Financial Administration Act¹⁶ and the Public Service Employment Act.¹⁷ They also made the point that the Registrar was an order-in-council appointment and was therefore without security of tenure and that the Registrar's performance was assessed annually without participation by the Chief Justice of Canada. Jules Deschênes had also called for a severance of ties with general government policies, stating that the relevant Acts "should be amended so as to free the Supreme Court from the administrative constraints that still bind it in personnel and budgetary matters; and these activities should be placed under the sole responsibility of the Chief Justice."¹⁸

The then Registrar of the Supreme Court would have gone further and broken the link between the Court and the Minister of Justice, who would be replaced by the President of the Treasury Board. The President would lay before Parliament the Court's estimates prepared by an upgraded Registrar (with tenure, pay, and pension similar to those of a Federal Court judge). The Registrar, in this scheme, would appear on behalf of the Chief Justice before any parliamentary committee regarding estimates and supplementary estimates.¹⁹ The scheme could not, however, constitutionally avoid the executive and Parliament. Funds would still have to be appropriated by the House of Commons, and the House could not act without the government recommending the appropriation.²⁰

This scheme was not, however, embraced by the Court itself and was therefore not adopted. It was better, it was thought, to try to improve the working of the 1977 Act. Chief Justice Dickson had made his views known in a strong speech to the Canadian Bar Association in August, 1985.²¹

Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise...Effectively, the financial and administrative requirements of the judiciary for the dispensing of justice are in the hands of the very ministers who are responsible for defending the Crown's interests before the courts. This ambiguity must be eliminated...Preparation of judicial budgets and distribution of allocated resources should be under the control of the chief justices of the various courts, not the ministers of justice. Control over finance and administration must be accompanied by control over the adequacy and direction of support staff.

A number of important adjustments were made in the relationship between the Department and the Supreme Court. Perhaps the most important was for the Minister of Justice to forward the Supreme Court's budgetary requests to the Treasury Board without change. The Department, apart from the Minister, does not now get involved with the budget. The involvement of the Minister has the advantage that a

knowledgeable and usually powerful minister is available to support reasonable submissions. As the present Registrar wrote in 1991: "In the recent past, successive Ministers of Justice have not only never interfered with any of the Court's requests, but have been supportive before the funding bodies, Parliament and Treasury Board."²² The relationship has clearly improved, the Registrar stating: "Treasury Board has been responsive to the Court's needs as they relate to the judgment rendering process and activities in the Judges' Chambers. The present system has its advantages: in particular it is well charted. It has served the Court well in the past and the arms length relationship has been maintained."²³

The employees continue to be public servants and subject to the various Acts applicable to all public servants, such as the Public Service Employment Act²⁴ and the public service Staff Relations Act²⁵. In my opinion, this is as it should be. It is desirable, for example, for employees to have mobility within the civil service, for the court to hire from the public service if suitable candidates are available, for Treasury Board classification guidelines to apply, and for government rules to apply to the release of staff. These Acts would now seem to be administered with more sensitivity to the special needs of the Court than formerly. For example, the system has proven flexible enough to permit the hiring of law clerks directly from the outside—an obvious necessity. And in the recent past, more recognition has been given to the needs of the Court with respect to the classification of professional staff. In my opinion, it would be difficult to accept a situation in which government rules with respect to collective bargaining, grievance procedures, salary scales, and employment conditions did not apply to the almost 150 persons employed by the Supreme Court or the approximately 400 persons employed by the Federal Court. And with respect to administration, it is more than reasonable to have government rules relating to accounting, audits, bidding, and purchasing apply to the Court, even though the Court thereby loses a measure of flexibility. These various rules give the Court some protection against inappropriate or improper financial dealings and thus provide a level of comfort and safety that helps prevent the Court from being drawn into controversy regarding finances or personnel.

The Registrar of the Court still does not have in law as much independence as he or she should have. According to the Supreme Court Act, the Registrar is appointed by the Cabinet and serves "during pleasure", that is, during the pleasure of the Cabinet.²⁶ In practice, the choice of Registrar is made on the recommendation of the Court itself, and the Court would not tolerate a dismissal by the Cabinet without the concurrence of the Court. In my opinion, these safeguards should be built into the Act and an appointment of a Registrar by the Cabinet should be made only on the recommendation of the Chief Justice, and any dismissal should be made with the concurrence of the Chief Justice. In Australia, for example, the chief executive officer of the High Court of Australia is appointed by the Governor General upon the nomination of the Court.²⁷

The system with respect to the Supreme Court of Canada appears to be working reasonably well now, although budget cutbacks obviously create problems. Chief Justice Lamer recently commented on the arrangement with respect to the Registrar's

functioning "subject to the direction of the Chief Justice"²⁸ by stating: "I have found that this arrangement is a good one and goes a long way towards assuring both judicial independence and management effectiveness."²⁹ The government is no doubt willing to give the Supreme Court a large measure of independence because of the trust that society places in that institution and because of the great visibility of almost everything it does.

3. THE PROVINCES AND TERRITORIES

In contrast with the federal courts, all provincial and territorial courts are now run by the attorney general's departments. Many judges, lawyers, and government officials expressed to me a desire to find a better solution. They recognize the awkwardness of the existing situation. The Ontario Joint Committee on Court Reform stated in 1992: "[T]he present organization of the justice system makes conflict inevitable. The government, on the one hand, is a primary litigant before the courts, yet on the other hand, is simultaneously responsible for the justice system. The dual role results in an obvious inherent conflict."¹ And a recent Quebec Task Force referred to "the ambivalence that exists in the relationship between the judiciary and the courts' support staff, who are at present torn between two loyalties."² The Ontario Joint Committee made the same point, stating: "In Ontario the staff who administer our justice system serve two masters. They are hired and paid by the Ministry and report directly to it. Paradoxically, their work tends to be directly in aid of adjudication which is the exclusive responsibility of the judiciary. The duality of staff responsibility leads to conflict, inefficiency and confusion."³ And Millar and Baar state: "A mutual reluctance to tread into the no-man's land between the ill-defined boundaries separating executive and judicial authority has retarded initiative, reform and modern court administration."⁴

Finding a solution is not easy. The Supreme Court of Canada has only nine judges and a relatively modest budget. Ontario and Quebec each have over 500 full-time judges, some at the appeal level, many more at the federally appointed superior court trial level, and the majority at the provincial court trial level. The trial courts across the country (federally and provincially-appointed) tend to share staff and facilities, particularly outside the very large centres. The budgets for court services are substantial. Ontario spends somewhere between a quarter and a half billion dollars a year (depending on what is included) on its Courts Administration Programme and has over 4,000 employees in over 200 offices.⁵ The administrative budget of the Supreme Court of Canada, in contrast, is about eleven and a half million dollars.⁶ Provincial governments understandably want a solution that provides the requisite accountability for these significant public funds.

Moreover, provincial governments rightly view the criminal court system as one component of the whole criminal justice system, which comprises the police, prosecutors, legal aid, the courts, and corrections. They do not want to remove

completely one key component from their analysis of the system. Many judges say that the solution to court congestion is to have more judges. Yet the better solution may be to have more prosecutors, who would then have the time to examine police charges carefully at an early stage for the purpose of not going forward with some of them or to negotiate a settlement with defence counsel.⁷ Whatever the solution is to the running of the courts, the attorney general's departments will necessarily keep a strong interest in the administration of the courts. And whatever the solution, the government will, for the most part, maintain the ultimate decision on what resources are to be devoted to the justice system.

Another reason why solutions are difficult is that there are sometimes conflicts in personalities amongst the various parties. Some federally appointed chief justices do not want to work with, or are wary of working with, the provincially appointed chief judges, and *vice versa*. Some chief justices or judges feel that their job is to judge, not to administer; one told me that the Deschênes Report is "for the birds". Still another said that in theory he likes the idea of autonomy but is too old to deal with the complex issues that would have to be sorted out. And some puisne judges would prefer to keep the administration of the courts in the hands of the government rather than giving more power to their chief justice. Further, the desire for change is often related to how well the courts do financially under the existing system.

There are a variety of techniques that have been adopted with respect to the running of the courts. In a later section we will examine in some detail the solution proposed in Quebec in December, 1993, that did not go through, that is, to turn the administration of the courts over to the chief justices and the chief judge collectively. And in the final section, we will look at some possible solutions. In this section, we are simply examining the existing situation.

Perhaps we should start our tour with the Yukon Territory. There, as in every other provincial and territorial jurisdiction in Canada, the Attorney General's department runs the court services. The Act provides that the executive "is responsible for the provision, operation and maintenance of court facilities and services."⁸ But there is a fascinating symbolic aspect to the recent history of the relationship between the judges and the Attorney General. In the mid-1980s, a beautiful new building was constructed in Whitehorse. It was in the form of an atrium with the courts on one side of the interior courtyard and the Attorney General's department on the other. It was easy to go across the courtyard from one side to the other at the ground level. Crossing was made even easier by an additional second-floor open walkway between the two sides. The senior judge objected to the arrangement. The public, he argued, would see too close a relationship between the courts and the government. With support of the judge's position from the legal profession, the government backed down. The walkway remains, but a number of potted trees prevent passage between the two sides. I have a picture of the walkway, which at one point I thought should appear on the front of this Report to illustrate that judges should at least symbolically occupy "a place apart".⁹

About four years ago, the Yukon Department of Justice and the courts set up a "Court Services Executive Board" to improve communication between the two sides. The system, borrowed from Manitoba, involves periodic meetings (about every other month) of four persons, the senior Supreme Court Justice, the Chief Judge of the Territorial Court, the Deputy Minister of Justice, and the Director of Court Services. The terms of reference are as follows:¹⁰

1. To review all proposals and plans having policy, organizational and budgetary implications for court services.
2. To review annual budget proposals for court services prior to finalization.
3. To initiate reviews, studies and recommend administrative and organizational changes in the operation of court services, including staff redeployment decisions.
4. To provide input into decision making and priority setting and in this regard, receive all status reports on key projects and initiatives.
5. To provide input into personnel matters affecting senior or key employees of court services.

The system has benefits and risks. It opens lines of communication which is desirable. The judges therefore have some influence on the decisions that are being made. But there is a danger that subtle and unexpressed accommodations on both sides may be made or appear to be made, such as pensions and study leaves in exchange for, say, looking favourably on the constitutional validity of a government initiative. The independence of the courts is not enhanced by the arrangement, although in the absence of an alternative its advantages outweigh its disadvantages. The physical open walkway has been removed, but it has been replaced by a behind-the-scenes walkway. This system is being adopted in many other jurisdictions. As mentioned above, Manitoba was probably the first to adopt the practice with its five-person Manitoba Courts Executive Board (three chiefs, the deputy minister, and the associate deputy in charge of court services). Other jurisdictions have followed suit. Ontario has a similar structure, with meetings once every six or eight weeks (although they had hoped to meet monthly). Prince Edward Island recently adopted the scheme. Some have meetings less regularly. The Nova Scotia group meets only three or four times a year, and New Brunswick has only an annual meeting.

Ontario has also adopted a large—at present comprising 17 members—Ontario Courts Management Advisory Committee,¹¹ as well as a nine-person Regional Courts Management Advisory Committee in each of Ontario's eight regions.¹² The province-wide Committee consists of the two chief justices and their associate chiefs, the chief judge, four representatives from the Attorney General's department, four lawyers, and four representatives of the public. They are to meet at intervals fixed by the Committee. The Regional Committees consist of three judges, including the regional senior general-

division judge and the regional senior provincial division judge and six others. They are to meet at least four times a year. These management advisory committees (colloquially known as the "big Mac" and the "little Macs") were the result of the 1987 Zuber Report on the Ontario Courts Inquiry.¹³ But whereas the Zuber Report recommended that these be actual management committees, the Ontario government turned them into advisory committees. We will look at the Zuber recommendations more fully in a later section.

In almost all provinces and territories the court staff is ultimately legally accountable to the Attorney General, although in practice the judges direct their immediate staff. British Columbia, however, worked out a somewhat different arrangement. The Chief Justice of British Columbia, Nathan Nemetz, obtained the agreement of the provincial government in the mid-1970s such that the judiciary would be responsible for and would receive its own separate budget for "judicial administration", with the definition of the phrase left to future negotiations. The judicial budget later expanded to include trial coordinators as well as the judges' confidential staff, but it still covers only a narrow range of court administrative functions¹⁴. In 1976, the B.C. Director of Court Services was officially given two bosses in relation to the Supreme Court: the Director is now "subject to the direction of the Attorney-General, *and* [my emphasis] to the direction of the Chief Justice in matters of judicial administration."¹⁵ Legislation extended this development to the Court of Appeal in 1979¹⁶ and to the Provincial Court in 1980.¹⁷ As a result of these legislative changes and the understanding between the judiciary and the government, certain personnel are hired and paid for by the judiciary themselves; some are shared with Court Services; and some are provided and paid for by Court Services.¹⁸ The Chief Court Administrator of British Columbia reported in 1987 that this hybrid structure had facilitated the development of increasingly cooperative links between the two administrative camps, the executive and the judiciary.¹⁹ A report in 1990 by Mr. Justice Guy Kroft, now of the Manitoba Court of Appeal, on "Judicial Support" (sponsored by the Canadian Judicial Council/Canadian Judges Conference Committee) approved of the B.C. model, stating: "Representations should be made to individual attorneys-general and perhaps to the Conference of Attorneys-General, with a view to bringing about legislative changes for the purpose of defining the role and responsibility of court administrators. In the Canadian context, the best model is probably the one that exists in British Columbia."²⁰

In Quebec, it is still the responsibility of the Department of Justice to prepare the budget that is required for the operations of the judicial branch, and to administer that budget.²¹ The Department established at the beginning of the 1960s the Judicial Services Division (under the direction générale des services judiciaires) to assist it in carrying out the various tasks.²² The budget item, "Administrative Support for Judicial Activities," has an appropriation of about \$100,000,000 and over 2,000 staff positions.²³ Recruitment, selection, and promotion of staff have been a government responsibility. In 1986, however, the Quebec Department of Justice signed memoranda of understanding with the provincial courts that now comprise the Court of Quebec. The understanding deals with the number of secretaries, bailiffs, and courtroom clerks,

the judges' authority over their secretaries' duties, and evaluation and monitoring of the quality and quantity of work done by the secretaries.²⁴ A pilot project designed to give responsibility for the management of all the Court of Appeal staff to the Chief Justice of Quebec was carried out in 1987-88, but was abandoned "in view of the bureaucratic obstacles that had to be overcome in order to give the Chief Justice greater authority over his administrative affairs."²⁵

In 1990, the Department of Justice offered each of the three levels of courts "co-management" of the approved budgets, thereby giving them responsibility for management of the staff directly attached to the judges, that is, secretaries, researchers, bailiffs, and messengers. Only the chief justice of the Court of Appeal, Claude Bisson, accepted the offer. In carrying out the management of this portion of the budget, the chief justice is assisted by the Director of Administrative Services of the Judicial Services Division, who in this case acts as Administrator for the Chief Justice. The other two courts refused the offer. Alan Gold, the Chief Justice of the Superior Court, stated in part:²⁶

With respect for the contrary opinion, I am of the view that the very concept of self-management implies that the Court itself must prepare its budget estimates and be called upon to justify them before the Treasury Board or the legislature. Self-management should therefore not be limited to the mere administration of activities for which the budget envelope has been predetermined by your department, as you are proposing. This explains why, while in no way doubting your good will, I have not in the past agreed and am not now agreeing to the proposal you are making.

And Albert Gobeil, the Chief Judge of the Provincial Court of Quebec, stated:²⁷

We believe that self-management, in the full sense of the word, cannot be achieved by accumulating precedents or adding up a variety of exercises in co-management. It does not appear to us to be wise to embark on an exercise designed with a specific goal in mind when the government itself is providing us with no assurances that it has the same goal in mind, that it is committed to making it a precise objective, and then to suggest methods that could be implemented gradually.

Despite these refusals, the Chief Justices of the Superior Court and the Chief Judge of the Court of Quebec agreed to manage two relatively small budget items: expenditure for judges' office furnishings and subscriptions and library acquisitions.²⁸ Approval and payment of provincially appointed judges' educational expenses has for some time been delegated to the Secretary of the Judicial Council.²⁹ This is how the matters stand today. We will discuss the December, 1993 proposal later.

Chief Justice Gold's view that "the Court itself must prepare its budget estimates and be called upon to justify them before the Treasury Board or the legislature" is not now the practice in any province or territory. Even the federal courts do not formally appear

before the Treasury Board or before Parliament or its Committees. Some attorney general's departments consult with individual chief justices and chief judges during the preparation of the budget. We saw, for example, that the Yukon Court Services Executive Board is to "review annual budget proposals for court services prior to finalization."³⁰ But some chief justices that I spoke to did not know and had no interest in knowing their budgets. Others clearly want to be involved in the process. One Appeal Court wrote to the Attorney General in September, 1993, stating:³¹

The Court of Appeal is never allowed to see any budget materials, let alone participate in their making. The Court can at best go to the Library and look up the public accounts of [the province]. It then finds that the Court is not mentioned. That must mean that it is divided up and buried in other items. And it must mean that those items are negotiated for and administered by *other* people outside the Court. Those people have agendas and priorities of their own. Therefore, the Court gets what is left after others have divided up the pie.

The administration of the courts in Ontario is run by the Attorney General's department, as in most other provinces. Section 71 of the Ontario Courts of Justice Act provides: "The Attorney General shall superintend all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary."³² Section 76 of the Act goes on to provide that the judiciary has authority over the preparation of trial lists and the assignment of courtrooms "to the extent necessary to control the determination of who is assigned to hear particular cases."³³ And section 78 provides that, "in matters that are assigned by law to the judiciary", court staff must act at the direction of the chief judge of the particular court, and court staff working in a courtroom must act at the direction of the presiding judge while the court is in session.³⁴ The many reports and documents suggesting that the system be changed will be analysed in a later section.

One recent very important development is the June, 1993, Memorandum of Understanding, which was entered into by the attorney general, Marion Boyd, and the chief judge of the Ontario Court (Provincial Division), Sidney Linden. The purpose of the memorandum is "to define the financial and administrative authority and responsibility of the Office of the Chief Judge and to clarify the operational and administrative relationships between the Ministry and the Office of the Chief Judge."³⁵ The nine-page document is valid until there is a new attorney general or a new chief judge.³⁶

The Chief Judge, according to the memorandum, was to acquire a new public sector position, "Executive Coordinator, Office of the Chief Judge", who "will take direction from the Chief Judge."³⁷ The Coordinator will, however, "meet on a regular basis with the Deputy Attorney General and the Assistant Deputy Attorney General Courts Administration to discuss issues of mutual concern."³⁸ (The position has now been filled.) Moreover, the Office of the Chief Judge will "prepare an operating budget for inclusion as a line item in the estimates of the Ministry for Treasury Board approval."³⁹ Although the Attorney General takes responsibility for the budget, the

parties agree that "no changes to the Chief Judge's operating budget shall be made without prior consultation with the Office of the Chief Judge."⁴⁰ The agreement lists the specific areas over which the Office of the Chief Judge has *exclusive* authority over. In general, the Office of the Chief Judge has exclusive responsibility "for all support services for judges of the Provincial Division and justices of the peace...including [their] salaries and benefits."⁴¹ Further, the Office of Chief Judge has exclusive responsibility for "managing all human resource functions for employees of the Office of the Chief Judge, the Offices of the Regional Senior Judges" and a number of others.⁴² In an appendix to the memorandum, there is a list of specific areas of exclusive responsibility. These include: salaries and benefits, training and education, travel, hospitality, and furniture, equipment, and supplies in the Office of the Chief Judge and the Regional Senior Judges.⁴³ Employees, including the executive coordinator, remain public servants within the Attorney General's ministry, and all public service staffing policies, pensions, and other employee benefits and conditions of employment apply to them.⁴⁴ Finally, there is provision for auditing the financial and administrative affairs of the Office of the Chief Judge.⁴⁵

The Ontario provincial court judges and the Attorney General's department appear to be reasonably happy with the new relationship. It has, according to the judges, changed the way the ministry views the courts and cut down the former friction. The Chief Judge has also entered into memoranda of understanding with the two judges' associations (criminal and family divisions) which apparently further eliminates potential friction. The new relationship with the Attorney General's department, according to the Chief Judge, is working much better than expected. Some of the judges, including the Chief Judge,⁴⁶ viewed this as a first step towards greater autonomy. Many, including the Chief Judge, are now having second thoughts about whether they wish to go much further. Other provinces, it should be added, are looking at establishing similar framework agreements.

4. THE DESCHENES REPORT

There have been a number of important Canadian reports and documents on the issue of the administration of the courts. In this and the following two sections, I will concentrate on the Deschênes Report, and Ontario and Quebec proposals.

The 224-page Deschênes Report, *Masters in their own House: A study on the Independent Judicial Administration of the Courts*, was published in 1981.¹ Following resolutions by the Canadian Judges Conference and the Canadian Association of Provincial Court Judges that studies be made and measures taken to ensure the exercise of judicial authority over the administration of the courts, the Canadian Judicial Council asked Jules Deschênes, the Chief Justice of the Superior Court of Quebec, to undertake the study, in collaboration with Professor Carl Baar of Brock University, a respected authority on court administration. The C.J.C. study was co-sponsored by the Canadian Judges Conference and the Canadian Institute for the Administration of Justice.²

Deschênes argued that there is agreement that *individual* judges should be independent from the state. There should, he went on, also be *institutional* independence:³

Faced with the increasingly pervasive presence of the state, the judiciary must also enjoy collective independence, for a general administrative decision can affect the judge's independent performance of his duties every bit as much as an individual contact. We are thus led to the conclusion that the judicial power needs a degree of administrative independence.

Moreover, he wanted this institutional independence explicitly enshrined in the Constitution.⁴

His arguments centred on several main considerations. The provincial attorney general who runs the courts is also the chief litigator before those courts. "It is the unanimous wish of the Canadian judiciary," he stated, "to see this ambiguity eliminated and the functions of attorney for public prosecution and provider of court services separated."⁵ Further, he stressed the "conflicting loyalties" of the support staff—"one to the minister and the other to the courts."⁶

Institutional independence, he suggested, should come in three stages: consultation, decision-sharing, and, finally, independence. Going through the first two stages was necessary, he stated dramatically, "before the judiciary could see the road widen and the sun of independence burst forth on the horizon. This new day is now dawning."⁷ Chief Justice Deschênes' view was supported by an international conference he helped organize, held in Montreal in 1983, which passed a resolution that the "main responsibility for court administration shall vest in the judiciary."⁸

The Canadian Judicial Council did not, however, see the widening of the road or the new day that was dawning, and by the spring of 1985 had approved only the second stage of the Deschênes report, that is, decision-sharing.⁹ This view was reflected in the 1985 Canadian Bar Association's *Report on Judicial Independence*, which stated: "Not all courts in Canada accept that it is desirable at this time to move past the second stage, and some members of this Committee have similar reservations. However, all are agreed that independence requires that the judges take a much more active and controlling role in court administration and that the second stage—decision-sharing—should be implemented as soon as possible in all Canadian courts."¹⁰ Some steps were taken by the Canadian Judicial Council to arrange a meeting between representatives of the Council and the Attorney General of Canada to discuss implementing stage two. The Minister of Justice responded favourably to such a meeting in early 1986, but it never took place, as it apparently coincided with the first joint meeting of the Executive of the Council and the Canadian Judges Conference. The Deschênes Report was then put on the back burner for the next five years.¹¹

Let us examine the structure envisioned by Deschênes for the third stage. Each province would have its own Council for administering the courts, and the same Council would also handle disciplinary matters for provincially appointed judges. The

Council would appoint a Director of Court Services to administer the courts. The composition of the Councils would vary, taking account of regional circumstances across the country. The Council would meet three conditions: (a) that there be no more than twelve members; (b) that judges be in the majority; and (c) that the Cabinet have no part in making appointments. The chief justices and the chief judges in the province would be on the Council, as would a federally and a provincially appointed puisne judge. There would also be lawyers and lay members. Neither the Minister nor the Deputy Minister of Justice nor any other cabinet minister would be on the Council.¹² Further, the Minister of Justice would be removed from the budgetary process. Estimates prepared by the Council would be submitted to the Speaker of the House for referral to the legislature's Special Committee on Judicial Affairs. Members of the court could seek a hearing before the Special Committee to make representations.¹³ Deschênes concluded the report by stating: "For the greater good of our society, the time has come when members of the judiciary must at last find themselves masters in their own house."¹⁴

Further interest in the Deschênes Report was taken by the Canadian Judicial Council in the early nineties. The Chief Justices of British Columbia and the Chief Justice of the superior court's trial division of Ontario were amongst those who were particularly interested in moving forward on the concept of administrative independence. The matter was given to the Judicial Independence Committee to "consider what steps should be taken to renew Council's interest in the subject matter of the Deschênes report."¹⁵ The chief justice of British Columbia, Allan McEachern, prepared a 27-page draft report in early 1992, which was discussed by some members of the Council with their respective attorneys general.¹⁶ A final report was never prepared. The present study grew, in part, out of these initiatives.

Chief Justice McEachern stated that conditions are "much worse" than they were when Deschênes reported:¹⁷

Ten years have now passed since Chief Justice Deschênes' Report. Notwithstanding the force of his recommendations, we believe the problem he raised is much worse now than it was then. As a result, the Canadian Judicial Council has asked its Committee on Judicial Independence to review *Maîtres chez eux* and to make such further recommendations as it thinks appropriate.

Because of large caseloads and the use of computers, officials answerable to the attorney general, he stated, "have assumed increasingly larger roles in the operation of the Courts."¹⁸ McEachern went on to say:¹⁹

As a result, we now find that in some provinces employees of the Executive Branch, with or without judicial supervision, are beginning to participate in the scheduling of trials, the assignment of judges for some classes of trials, the allocation of courtrooms, and the unilateral reorganization of such things as court reporters, sheriffs and courtroom staffing which in our view, properly belong within the prerogative of the judiciary.

A further recommendation, 5B, was added to Deschênes' recommendations. This recommendation, stated McEachern, "builds upon the ground first prepared for us by Chief Justice Deschênes":²⁰

That to ensure proper judicial supervision of Court administration, the Directors of Court Services shall be appointed by the Executive with the concurrence of the Chief Justices or Chief Judges of the courts being administered, and that insofar as operational decisions are concerned the Director and his or her staff shall be responsible to the judiciary.

The draft report did not embrace stage three of the Deschênes Report. It took a relatively modest approach, stating that "slow progress towards administrative independence may be the best course."²¹ The budget for administration would not go directly to the legislature, as Deschênes had argued it should, but would be steered through the process by the Attorney General.²² The draft report does not appear to envisage a Council handling court administration for all the courts together, superior and provincial:²³

All that is required to ensure the operational independence of the judiciary is for the Attorneys General to withdraw from any semblance or appearance of court operations by placing these administrators under the direction of the Judiciary. This has already been done in British Columbia with respect to the immediate judicial staff, but the supervision of the entire operating staff could and should be transferred to the judiciary. Chief Justice Deschênes recommended that the Directors of Court Services, or their equivalents should be appointed by the Attorney General after consultation with the Chief Justice or Chief Judge. That is a perfectly acceptable suggestion.

Chief Justice McEachern was therefore arguing for a somewhat expanded version of the system then prevailing in British Columbia.

5. ONTARIO PROPOSALS

The administration of the courts did not become a major issue in Ontario until the McRuer Report in 1968¹ recommended the centralization of the administration of the Ontario courts. Before then, the municipalities financed and administered the magistrates courts, and the counties and districts did the same for the county and district and the visiting superior court judges.

In 1970, the Attorney General of Ontario requested that the Ontario Law Reform Commission "undertake a study and review of the administration of Ontario courts and where necessary...recommend reforms for the more convenient, economic and efficient disposal of [their] civil and criminal business."² The Law Reform Commission Report recognized that judicial independence would limit their options, stating: "One of the

most difficult tasks in achieving an effective 'systems' approach to court administration is to determine the extent to which the accepted principle of judicial independence places a very real restraint on the government's power to constitute, organize and maintain the courts."³ The Commission favoured leaving court administration to the government, but leaving adjudicative processes to the judges: "Court administration should be the primary responsibility of government in order to provide the judges with more time to devote to adjudication. However, administrative decisions of government should never adversely affect the judges' adjudicative processes."⁴ "Because many adjudicative and administrative functions are interrelated," the Commission stated, "court administrative personnel will have to work very closely and maintain a special relationship with the judges, particularly the Chief Justice or Chief Judge of the respective courts."⁵ It was felt that this would be an improvement on the existing system, where "it is often unclear to whom the court staff are responsible for the performance of their tasks."⁶

Adjudication would be for the judges; administration for the government. "We strongly recommend," the Commission stated, "that the administrative framework be structured so that it is perfectly clear that on matters of adjudication, including administrative matters which are regarded by the judges to bear directly on adjudication, the Directors would be required to abide by the wishes of the judges."⁷ They conceded, however, that "it is not always clear in the operation of a court system which functions are adjudicative and which are administrative."⁸ The Commission recommended that renewal of the key position of Director of Court Administration be on the advice of a committee consisting of the Chief Justices and Chief Judges and two senior civil servants.⁹ This was not, however, incorporated into the legislation.

The Commission also proposed an integration of the administration of all levels of courts at both the provincial and the regional level. This was so that more effective use would be made of facilities and personnel; the relationship and communication between the various courts would be improved; and a more equitable distribution of resources and administrative attention could be achieved. At that time, the various courts were treated as separate units.¹⁰

To test this new cooperative arrangement, a pilot project in court administration—in particular, case-flow management in the criminal division of the Provincial Court—was undertaken in the area surrounding Hamilton. The project, known as the Central West Project, was a failure.¹¹ The Attorney General's department conceded that the project was "largely unsuccessful"¹². The Attorney General's Advisory Committee on the project unanimously decided that the responsibility for case-flow management should rest with the judiciary.¹³ The later Zuber Inquiry stated:¹⁴

During the course of the project, it was impossible to achieve a sufficient degree of co-operation between the Ministry of the Attorney General and the judiciary to enable various kinds of experimentation to take place. The judiciary took the view that any relinquishing of control was a threat to its

independence, and that all aspects of caseload management must rest exclusively in the hands of the judges.

In October, 1976 the Attorney General's Department put out a "White Paper on Courts Administration". The attorney general, Roy McMurtry, now the Chief Justice of the superior court's trial division in Ontario, and his deputy, Frank Callaghan, McMurtry's predecessor as chief justice, concluded that the judiciary should administer the courts. The White Paper referred to "the fundamental management weakness of dividing between the judiciary and the Ministry the overall authority for courts administration."¹⁵ The divided administrative structure, in the Department's view, prevented any real progress in the key area of case-flow management: "The Central West experiment proved that divided management is detrimental to any effective court reform, cumbersome in practice and functionally impractical...Split control over judicial and administrative matters must ultimately result in no control."¹⁶ "Constitutional principle," the White Paper stated, "could never permit judges to receive orders from a minister or his servants with respect to the judges' working patterns or caseloads."¹⁷ The solution therefore proposed was to set up a Judicial Council of senior judges who would have the power to set working standards for judges and to apply those standards.¹⁸

The Judicial Council would be composed entirely of judges. The Office of Courts Administration would be responsible to the Judicial Council and the relevant staff would be transferred to this office from the Attorney General's Department. The Council would have wide powers—to hire and fire people and to supervise the conduct of the business of the courts.¹⁹ The Attorney General's Department, however, would still be responsible for the budget, but the court administration estimates would be kept separate from other estimates.²⁰

The response to the White Paper was not enthusiastic. There was scepticism within the Bar and editorial comments were against it.²¹ The scheme was not implemented, although two provincial advisory committees were set up.²²

In July, 1986, the Ontario government asked Thomas Zuber of the Ontario Court of Appeal to study the courts in Ontario. His 1987 report, *Report of the Ontario Courts Inquiry*,²³ looked at the question of judicial independence and the managing of the courts.²⁴ His view that constitutionally it was not necessary to give the judges the powers to administer the courts was, of course, similar to Justice Le Dain's view in *Valente*.²⁵ To Zuber, judicial independence required that the judiciary "must have the power to determine standards for matters that bear directly on the essential quality of justice in individual cases."²⁶ "This includes," he went on to say in an oft-quoted passage,²⁷

...the assignment of the totality of a judge's workload, the setting up of particular forms of sittings in order to discharge the court's business, but nothing else. It is not essential to the quality of justice that the courts be housed in a particular way, that judges be provided with particular numbers or

kinds of support staff or that judges be assured of any given level of salary or other benefits. And it is particularly not essential to the quality of justice in the courts that the judges have direction or supervision over the administrative staff, except in the areas identified by Part VI of the *Courts of Justice Act* and the setting of judicial workloads.

Even though judicial administration was not required on constitutional grounds, he stated, it “does not dispose of the question whether judges should, for other reasons, assume control of the administration of the courts.”²⁸ He was not impressed with the arguments in favour of the judges administering the courts. As to the Attorney General being “the single biggest litigator in the courts,”²⁹ he responded: “If there were instances where the Ministry of the Attorney General had used or attempted to use the administration of the courts, or had even contemplated doing so, to its advantage in litigation to which it was a party, no such instances were brought to the attention of this Inquiry.”³⁰ And as to the argument with respect to efficiency, he stated that “there appears to be little merit to the argument that judges make better administrators.”³¹

Zuber J.A. liked the Law Reform Commission’s idea of “a close working relationship and mutual consultation.”³² His solution was therefore “shared responsibility”:³³

The approach favoured by this Inquiry is shared responsibility for the operation of the court system, with the judiciary having the final say on matters of assignment of judges, standards for judges’ workloads, assignment of individual cases and the arrangement of a sitting schedule. The administration of all other aspects of the court system would be left in the hands of the Ministry of the Attorney General with the provincial government having final authority on certain matters. To ensure co-ordination of the efforts of the judicial and administrative sides and the constant interchange of information, a permanent courts management committee should be set up.

An Ontario Courts Management Committee would have power to administer the courts. The Committee would consist of five senior judges, three senior persons from the Attorney General’s Department, a member of the Bar and a member of the public. The judicial component would therefore be exactly half of the 10-person committee. The Chief Justice would chair the Committee, but the report does not state what would happen in the case of a tie vote.³⁴ The government did not accept this particular arrangement. Instead, as discussed earlier, a provincial advisory committee and regional advisory committees were set up. (Although the 1973 Ontario Law Reform Commission Report had recommended regional management, it was not introduced until after the Zuber report.)³⁵

In 1991, a non-governmental Committee on Court Administration was set up. The Committee was an off-shoot of the Joint Committee on Court Reform that had been established in 1988 by a number of lawyers’ groups in Ontario—the Advocates’ Society, the Ontario Section of the Canadian Bar Association, the County of York Law

Association, the Criminal Lawyers' Association, and representatives from the Law Society of Upper Canada.³⁶ The Court Administration Committee reported in June 1992. They wanted the judiciary to run the courts, stating: "The Committee recommends that the judiciary assume the primary responsibility for the administration of the Ontario Courts."³⁷ The see-saw between different views continued. They were concerned about the "inherent conflict" in the role of the government in being the chief litigator and also the administrator of the justice system.³⁸ Moreover, they argued, there is now "no clear division of responsibility between the judiciary and the government in some of the most sensitive and important aspects of court administration."³⁹ The staff, they argued, "serve two masters" and this "duality of staff responsibility leads to conflict, inefficiency and confusion."⁴⁰ They offered a specific example: "There are instances where judges wish to work beyond the usual court hours to complete a matter, but they are prevented from doing so because the court staff have not been authorized to stay and be paid."⁴¹ Judges, they state, can administer funds better than representatives of the government:⁴²

A large part of the problem with the allocation of funding in the present system is that decisions are made by Ministry representatives not intimately familiar with the day to day operations and needs of the courts. By way of contrast, the members of the judiciary are familiar with the problems of the courts. An understanding of existing problems is a first and critical step in developing solutions...As the judges are ultimately responsible for the quality of the justice dispensed by the justice system, they should have ultimate control of its management.

"The transfer of administrative responsibility," the Committee states, "would encourage judge directed innovation, initiative, efficiency and accountability in the system at all levels."⁴³

They proposed an immediate solution and then what they described as a medium-term solution. The immediate solution was to establish a four-person Interim Council composed of the three chiefs and the Attorney General or, more likely, the deputy. During this interim period, responsibility and accountability would remain with the Attorney General.⁴⁴

The second stage would transfer by legislation the responsibility for the courts to a Court Administration Council. "The exact composition of that Council and other specifics," they state, "would be arrived at over a period of extensive consultation leavened by the experience gained in the interim period."⁴⁵ Court staff, such as interpreters, reporters, accountants, and sheriff's personnel, would be transferred to the new Ontario Courts Service.⁴⁶ Further, the court budget would not be part of the Attorney General's estimates, but the allocation would be made directly by the Legislative Assembly and the Judicial Council would account directly to the Legislative Assembly in the same manner as is done for the Ombudsman and the Provincial Auditor. No specific minister would be responsible for the needs of the judiciary.⁴⁷

6. QUEBEC PROPOSALS

On December 3, 1993, an important legislative initiative, Bill 144, "An Act to establish the conseil d'administration des tribunaux judiciaires,"¹ was introduced into the Quebec National Assembly by the minister of justice, Gil Rémillard. On December 14, 1993, the background document, prepared by a Task Force, that led to the Bill was tabled in the Assembly. The Task Force report, "Administrative Autonomy of the Courts of Justice in Quebec,"² argued the case for judicial administrative autonomy, and Bill 144 set out a scheme for achieving it. However, because of opposition to the Bill, particularly by the puisne judges of the superior court, it did not proceed to second reading. At the time of writing, no further Bill has been introduced by the government. Before the report and the Bill are examined, some of the earlier Quebec documents will be looked at.

In 1985, Quebec City lawyer Charles Tremblay prepared a report for the Quebec Judicial Council, "Rapport préliminaire sur la faisabilité de l'indépendance administrative de la magistrature" (Preliminary Report on the Feasibility of the Administrative Independence of the Judiciary).³ It will be recalled from an earlier section that the Minister of Justice now prepares the court administration budget and administers it through the Judicial Services Division.⁴ The Tremblay Report proposed that in line with the Deschênes Report a new Council be established that would be responsible for hiring a Judicial Services Administrator who would prepare the annual budget and supervise the court personnel. The Conseil administratif des tribunaux judiciaires (Courts of Justice Administrative Council) would be composed of the chief justices and chief judges of each of the three levels of courts plus two associate chiefs from each court. The nine-person Council would be chaired by the provincially appointed Chief Judge of the Provincial Court (not by the Chief Justice of Quebec). The Council would have an executive committee, a committee for federally appointed judges, and another committee for provincially appointed judges. The budget prepared by the Judicial Services Administrator would be presented to the National Assembly and not to the Minister of Justice, although the estimates would be included as a separate item in the budget estimates of the Department of Justice.⁵

The Department of Justice later asked Marcel Proulx to prepare a report on various alternatives. His 1990 report, "La gestion des tribunaux québécois: Étude et diagnostic des rapports entre la magistrature et les services judiciaires" (Management of the Quebec Courts: Analysis of the Relationship between the Judiciary and Judicial Services),⁶ set out three scenarios for reform. The first was to strengthen the informal procedures for cooperation. He was not optimistic, however, that this would change anything, stating that such reform "will merely institutionalize negotiations and, eventually, conflicts between the issues put forward by the Chief Justices and those defended by judicial services." "In short," he concluded, "it would not actually make any change in the status quo."⁷

A second scenario was to give the courts autonomy for “material and human resources directly allocated to services to the judiciary (secretaries, bailiffs, researchers, security staff, office supplies, office equipment, accommodations, and provincially appointed judges’ travel).”⁸ This, according to the author, “presented major advantages”: “judges would undoubtedly be more reasonable in their demands if budgetary discipline...was imposed on them by a legitimate authority, their Chief Justice, rather than being dictated by a government official, who can always be suspected of having prejudices against the judiciary or of not understanding judges’ work.”⁹ One “major” difficulty, however, according to the author, is that “it is not apparent that the Chief Justices would be able to agree on the rules for sharing and managing resources.”¹⁰ The third proposal was to create a new “autonomous body under the direct authority of the National Assembly...to manage all services in support of judicial activity.”¹¹ The body would be composed of the three chief judges, with the possible addition of a minority representation of non-judges appointed by the government.

A proposal similar to the last one (without the addition of non-judges), and modelled on the rules governing the Auditor General, was proposed by the three levels of courts at a Justice Summit in February, 1992. The judiciary would prepare its own budget, submit it to the National Assembly for approval, and then manage it with the assistance of staff under its authority.¹² The Summit passed a joint resolution of all three courts that a Committee be set up to work out the details of administrative autonomy.

The Minister of Justice, with the support of the Cabinet, then set up a task force to examine further the issue of administrative autonomy for the courts and to make recommendations.¹³ The Task Force was composed of the two chief justices and the chief judge (assisted by three associate chiefs) and three senior government officials, the Secretary General of the Executive Council, the Secretary of the Treasury Board, and the Acting Deputy Minister of Justice.

The Task Force reported in December, 1993, and recommended transferring certain activities to the judiciary. They stated:¹⁴

Recognizing that while autonomy is not necessary in the administration of certain judicial activities in order to ensure the independence of the judiciary, it may nonetheless contribute thereto and sensitive, as well, to the fact that it would be desirable to put an end to the friction, clashes and irritants on which a number of studies have commented adversely, the members of the Task Force propose transferring the administration of certain activities that are closely tied to the exercise of judicial jurisdiction to the judiciary. In other words, we are referring essentially to activities in the decision-making process which precede the final judgment of the court, including the security of judges, not only in courtrooms, but also in areas reserved for the judiciary.

This would include secretaries, researchers, furniture, maintenance, travel, education expenses, courtroom clerks, bailiffs and translators. It would not include such things as collecting spousal support payments, executing judgments, collecting fines, mediation, and maintenance of records.¹⁵

An autonomous body would be established representing all three courts, thereby avoiding "the fragmentation of the administration of the courts and the necessity of preparing and managing three separate budgets."¹⁶ The new Council would consist only of chief or associate chief judges, four from the federally appointed judges and four from the provincially appointed judges.¹⁷ The Council would be chaired by the Chief Justice of Quebec, who would have the deciding vote in the case of a tie. An Administrator would be appointed by the government, after consultation with the Council, to actually administer the courts.

The government would not accept the judges' proposal of an Auditor General model for the Council under which estimates go directly to the National Assembly. The government insisted that they should have the responsibility of finalizing the estimates that were to go to the Assembly. The report then states:¹⁸

The results of this review of programs [by the Council] would be forwarded to the Executive Council and the Minister of Justice, who would forward them to the Treasury Board for analysis and discussion with the representatives of the Courts of Justice Administrative Council. Once this work was done, the members of the Council would meet with the Ministers of Justice and Finance and the President of the Treasury Board so that, if necessary, outstanding requests can be explained and any difficulties ironed out. Thereafter, under the rules that are established for this purpose, the government would first prepare the final envelopes available for administering the courts, and the judiciary would then prepare detailed estimates based on which the Treasury Board would prepare the "Blue Book"; they would then be entered as a separate line item: "The Judiciary".

This was obviously very important to the judiciary, if the judiciary were to be integrated into the estimates process. The next paragraph of the report went on to state: "It is essential to the Chief Justices' support of this report that the process described in the foregoing paragraph be followed."¹⁹

The Bill introduced by the Minister of Justice²⁰ did not, however, contain any discussion of the government's budgetary process. The budget presumably would therefore continue to go to the Minister of Justice, who would shepherd it through the various stages. All the other major recommendations of the Task Force were included, however, such as the composition of the Council. The Bill added a mission statement: "The mission of the Council is to provide administrative support for the judicial activities of the Courts of Justice without infringing upon the autonomy and independence of each Court."²¹

No doubt, the failure to include the “essential” estimates procedure was one serious factor in the Bill’s not proceeding any further. I discussed the Bill with government officials, with chief justices, chief judges, and puisne judges at all levels of courts in Quebec. There are many other reasons why the Bill was not acceptable to the judiciary. The judges on the Task Force were expressly not binding their courts. Indeed, there is a note at the front of the report that specifically states: “The judges who have signed this report wish to note that they have done so without necessarily intending it to be binding at this stage on any of the Courts of which they are Chief Justices.”

Some of the reasons expressed to me for opposing the Bill were: fear that this was simply a device that would force the judiciary rather than the government to administer a substantial cut in resources; suspicion that the Administrator would be loyal to the government and not the judges; concern by the puisne judges that the scheme was being run solely by the chief judges; unhappiness by provincial court judges that the Chief Justice of Quebec would have the deciding vote in case of a tie; recognition that the new Ontario provincial court memorandum of understanding scheme might be a more attractive model and one which the Quebec courts had been offered several years earlier; concern that they would be giving up their right to sue the government; discomfort about the idea of working with the other courts; dislike of getting involved in collective bargaining; anxiety by the provincial court judges that the superior court judges would get an undue share of the resources; and, finally, anxiety by the superior court judges that the provincial court judges would get an undue share of the resources.

Most observers concede that the Bill was presented in the National Assembly too hurriedly and that the puisne judges were not kept sufficiently informed. Even the chief justices had apparently not seen a draft of the Bill until it was introduced.²² The puisne judges had not been part of the discussion and debate and had not even officially seen the Task Force Report until it was tabled after the Bill was introduced. The judges of the superior court were overwhelmingly against the Bill. Apparently the rush in introducing the Bill was because the Minister of Justice was not standing for reelection and December, 1993, was the last chance for him to introduce it. As stated earlier, nothing further has officially been done to resurrect the Bill.

7. ENGLAND

The Lord Chancellor’s Department finances and administers all the courts in England (with the exception of the magistrates’ courts) through a division employing over 10,000 persons, called the Court Service.¹ The Magistrates’ Courts are administered locally, but are now subject to the supervision of the Lord Chancellor’s Department.² Their system of administration is more “judiciary-based” than that of the other courts.³

Reorganization of the court system in 1971, following the Beeching Report,⁴ was primarily responsible for the “very substantial shift in the control of the administration of the courts from the judges to civil servants.”⁵ As in Ontario following the McRuer Report,⁶ the government in England took over the financing and running of the courts. Beeching also brought about the regionalization of courts in England into six circuits. As in Ontario, which is now divided into eight regions, following the Zuber Report,⁷ there is a government administrator in charge of the running of the courts in each circuit and two senior judges, called the Presiding Judges, who give continuity of attention to the circuit’s affairs. (Only one of the judges will normally be present on circuit at any one time.) One leading academic writer on court management in England has written that “In the years since [Beeching], the so-called ‘service’, consisting of some 10,000 people, has taken over (or even become) the organization it was designed to assist.”⁸

So the running of the courts in England is fairly similar to the pattern in the Canadian provinces, unless one concludes that the Lord Chancellor is more a judge than a member of the executive. It is difficult for a foreign observer to get a true picture of another legal system—even one as familiar as England’s. Still, it seems reasonably clear that many knowledgeable and influential persons in England now view the Lord Chancellor as more a political figure than a judge. This is true even for Lord Mackay, who was appointed to the House of Lords on his merit, and only later became the Lord Chancellor. One academic writer has stated that the argument that the Lord Chancellor runs the courts in his judicial capacity “is looking increasingly threadbare.”⁹

I will quote liberally from a speech delivered in 1987 by Sir Nicolas Browne-Wilkinson,¹⁰ then the Vice-Chancellor and now (as Lord Browne-Wilkinson) a Lord of Appeal who sits on the appellate committee of the House of Lords, to illustrate the view that the Lord Chancellor is increasingly being regarded as a politician. The speech could easily have been delivered by any one of a number of provincial chief justices in Canada. With respect to budgeting, Browne-Wilkinson stated:¹¹

The legal system is financed in the same way as any other department of government. The Lord Chancellor and his department prepare a budget which is negotiated with the Treasury. The government then asks Parliament to vote the money. Once this is voted, the Lord Chancellor with the help of his department then allocates the funds amongst the different demands for legal services. The Lord Chancellor, as a member of the government and the responsible minister, is accountable to Parliament for the expenditure of the money voted...If Parliament and the minister between them control the provision and allocation of funds, how can the administration of justice be independent of the legislature and the executive? He who pays the piper calls the tune.

He then complained about the fact that the administrators are answerable to their political masters, not the judges:¹²

It is the lack of any clear demarcation between the functions to be performed by the judiciary and the functions to be performed by administrators which gives rise to the present stresses...The court administrators are answerable to their superiors in the civil service, not the judges...Judges are sitting in an environment wholly determined by executive decision in the Lord Chancellor's Department, which in turn is operating under the financial constraints and pressure imposed by the Treasury...[B]oth the total budget and its allocation are under the exclusive control of the executive, who administer the system through ordinary civil servants, who are not answerable to the judges. Judges have no power or function in relation either to the total budget or its allocation.

He argued for judicial involvement in the process, perhaps somewhere between Deschênes' first stage, consultation, and his second stage, decision-sharing:¹³

Although the ultimate fixing of the total budget must be a political act, if there is to be any judicial independence the judges must at least be involved in the preparation of the estimates on which the total budget is voted. More important, the judges must be involved in the allocation of that budget, once voted, amongst the various functions of the legal system so as to ensure that, subject always to the supremacy of Parliament, the administration of justice is under independent control.

Similar views were expressed by other judges. Sir John Donaldson, the Master of the Rolls, proposed the following tentative solution:¹⁴

The solution may lie in a structure, whether formal or informal, which recognises that it is for the executive to fund the courts service and to administer the administrators, for the administrators to service the judiciary and for the judiciary to control the operational functions of the courts service.

And in a 1993 public lecture, Sir Francis Purchas, who had just retired from the Court of Appeal, stated that "the Judiciary must be allowed a significant role in the administration of the courts...The independence of the Judiciary will only be secured by recognizing that they should have a statutory right to control or supervise the running of the courts where this affects directly the administration of justice."¹⁵ He would apparently give the judges the right to determine the number of judges appointed and would fund the judiciary without taking into account financial conditions: "The requirements of the Judiciary must be scrutinized against their intrinsic needs and not by reference to external economic constraints."¹⁶ Browne-Wilkinson had taken a less aggressive stance, stating: "The cost of providing justice is only one of the calls on public revenues. There is no justification for a claim that the legal system has a greater right to public funds than, for example, the National Health Service or education."¹⁷

The extent to which the above views actually represent the views of the majority of English judges is difficult to say. No doubt, as in Canada, there is a range of opinion on the subject. And the views will change in relation to particular incidents¹⁸ and the

extent that the Lord Chancellor consults with the judiciary. Referring to Browne-Wilkinson's speech, the Lord Chancellor stated: "That was the view of the Vice-Chancellor in 1987 shortly after I took office. I have attempted to involve the full-time judiciary more fully in discussions on matters concerning resources than perhaps had been the case hitherto."¹⁹

The present Lord Chancellor, Lord Mackay, has on a number of occasions argued for maintaining the existing system. The office of Lord Chancellor, he argues, plays an important role in the legal system: "The fact that the Lord Chancellor is both Judge and Minister means that he is able to act both as a bridge and as a fortification between the executive and the judicial powers. I believe that it is of the utmost importance that among the members of the Cabinet is someone who is qualified to and does sit as a judge at the highest level."²⁰ The Lord Chancellor, he points out, "does not advise the government as a litigant and does not have responsibility for prosecuting criminal cases."²¹

He acknowledges that judges must have a measure of control over the scheduling of cases:²²

In order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process. If judges were not, for example, in control of the listing of cases to be heard in the courts, it might be open to an unscrupulous executive to seek to influence the outcome of cases (including those to which public authorities were a party).

"Yet listing," he goes on to say, "is also one of the principal factors influencing the efficiency with which the courts handle hearings of cases."²³ The judges and the Lord Chancellor must, therefore, "work closely together as partners in the efficient and effective administration of justice."²⁴

In the 1993 Hamlyn Lectures, the Lord Chancellor argued that because of life tenure, the judiciary cannot be accountable for administering the way money is spent: "being a judge on secure tenure...there is no basis upon which he can be accountable to Parliament for the way in which the money is spent and the manner in which the courts are administered."²⁵ The Lord Chancellor, on the other hand, "does so without any security of tenure and therefore when he is responsible for the administration if things go wrong it is possible to get rid of him readily and secure a replacement."²⁶ He concluded his lecture on the courts by stating:²⁷

[I]n the British situation as I see it at present and for the future so far as I can see it, I consider that any move to making the professional judiciary who are tenured responsible for the administration of the courts and for the administration of the Vote for the courts, to the House of Commons, would be an extremely retrograde and confusing step. The support of the courts in these

matters is, in my view, the duty and the responsibility of the executive and should be clearly seen to remain so.

A new development has recently occurred in England that may circumvent this impasse. In 1988, Margaret Thatcher's government introduced what is described as the "Next Steps"²⁸ policy, and John Major's government subsequently introduced a "Citizen's Charter"²⁹. These programmes are designed to improve the efficiency of government services and to give the citizen various rights to good service. The "Next Steps" agenda was to try to get senior managers in government to spend more time thinking about the delivery of services. One senior official explained to me that senior managers now spend 90% of their time on policy and 10% on delivery.

To right the balance, separate government agencies would be established to deliver services. One such agency would be the Court Service.³⁰ The Agency is scheduled to start operation in April, 1995. The Agency would be part of the civil service. This would not be a move towards privatization. Nor would the Agency even be a department separate from the Lord Chancellor's Department. But it would have greater flexibility in personnel matters than do other parts of the civil service. Staff would report to the Chief Executive of the Agency, who in turn would be answerable to the Lord Chancellor and to the Public Accounts Committee of the House of Commons. Targets would be set for the Agency, and the Agency's performance might affect the Chief Executive's salary. Of course, setting meaningful targets will be a major challenge in setting up the Agency.³¹ In his 1993 Hamlyn lecture, Lord Mackay stated:³²

I intend to improve the administration of the courts of England and Wales by creating an Executive Agency to give the administrative support to the judges which it is the responsibility of the Lord Chancellor to provide. This agency will have the characteristics of other agencies which have been successfully established in the last few years, for example the Land Registry and the Public Record Office in the Lord Chancellor's area of responsibility. It will have a Chief Executive, responsible to the Lord Chancellor, but with a degree of freedom of operation within a framework set down at its inception. The Agency will be expected to work to deliver the service which the administration of justice requires. One of the key features of a successful Agency will be the arrangements for co-operation with the judges.

It is the last sentence that could—and in my view probably will—improve relations with the Lord Chancellor and will give the judges a large measure of input into the formulation and expenditure of the budget. Lord Mackay went on to say:³³

In my opinion, the successful administration of justice depends on close cooperation between the judiciary and the members of the Court Service at the headquarters level, at the circuit level and at the level of the court centres. It will be necessary in the framework document of the new Agency to articulate these arrangements, but the primary necessity is a mutual understanding

between the judges and their supporting officials, with a unity of purpose in what they seek to achieve. As I have said, it would be a misuse of the judges' time to immerse them in the minutiae of administration. On the other hand, it is crucial in my view that the administrators who support the judges understand the judicial policy and seek to carry it out in detail in the areas affected.

Each Agency is to have a Framework Document, plus both a Corporate and a Business Plan. It is not expected that the latter two plans will be available before the Agency commences operation in April, 1995. The Framework Document will, however, be available. The Lord Chancellor's Department gave me a working draft of the Document, dated April, 1994. This draft document strongly encourages the involvement of the judiciary. The foreward by Lord Mackay states: "I look to the Chief Executive to ensure that the agency works closely with the judges and this framework document requires him to consult and inform them on a range of issues."³⁴ A wise Chief Executive who is interested in salary increases will ignore this direction at his or her peril. Perhaps we will see agreements between the Agency and the courts, as in Ontario, dealing with the financial administration of various items and the elusive dividing line between adjudication and its "penumbra" and administration. Perhaps we will see various forms of consultative committees involving puisne judges as well as heads of divisions. All in all, it is a very interesting development that should be watched very carefully.

As an addendum to this section, it should be noted that the Agency was officially launched on April 3, 1995, with a Framework Document, as well as a Corporate and a Business Plan. The Lord Chancellor's foreward to the final Framework Document spells out in even greater detail the requirement for consultation with the judiciary:³⁵

I look to the Chief Executive to ensure that he and his senior managers work closely with the Lord Chief Justice and the other Heads of Division, the Senior Presiding Judge, Presiding Judges and the Circuit and District Benches, as appropriate, to ensure that all parties are enabled to carry out their respective responsibilities and duties which I shall set out from time to time in a letter of instruction to the Chief Executive.

I will also continue to consult personally the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice Chancellor and the Senior Presiding Judge (and, as appropriate, other members of the judiciary) in reaching a view on the exercise of my responsibilities in relation to the operation of the Court Service after 3 April 1995.

The document also contains in an Annex a letter from the Lord Chancellor to the Chief Executive Designate outlining the type of consultation expected. With respect to resource management, for example, the letter states:³⁶

In determining priorities across the Court Service, you should endeavour to ensure that all courts are adequately resourced to meet workload and planned levels of sittings. I shall specifically require you to have discussed with the judiciary the content of your corporate and annual business plans before they are submitted to me for approval. I shall also require you to discuss with the judiciary your plans for dealing with any major in-year change in resource allocation which may materially affect the performance of the Court Service before putting your revised plans to me.

The consultation aspect of the new arrangement, I am told, has been given a cautious welcome by the senior judiciary.

8. AUSTRALIA AND NEW ZEALAND

Australia and New Zealand, like Canada, demonstrate a wide range of techniques for handling the relationship between the executive and the judiciary. It is difficult for a foreign observer to get a very clear picture of what is happening without actually spending time in Australia for this purpose, which I have not done. But even a very knowledgeable Australian commentator, with reference to the situation in one of the Australian states, has remarked on "how difficult it sometimes is to comment on issues pertaining to judicial independence at a time when they are current."¹

Prior to 1979, the executive, that is, an Attorney General's Department or a Department of Justice, administered the courts in Australia and New Zealand. In that year, the High Court of Australia was given the type of administrative autonomy that we saw with respect to the Supreme Court of Canada. Since then, notable developments have taken place in South Australia, leading to American-style judicial autonomy in 1993. Throughout Australia, as in Canada, there seems to be a growing desire by the judiciary for greater administrative independence. Let us first look at the federally established courts.

In 1979, the High Court of Australia Act was passed.² Section 17 of the Act states that "the High Court shall administer its own affairs."³ The Court acts collectively, although it "may appoint committees consisting of Justices, or of Justices and other persons, for the purpose of advising the Court in relation to" the administration of the Court.⁴ There is a chief executive officer of the High Court, who is appointed upon the nomination of the Court.⁵ The chief executive officer "has the function of acting on behalf of, and assisting, the Justices in the administration" of the Court.⁶ The government's budget appropriation for the Court is simply a one-line item.⁷

The legislation with respect to the High Court goes beyond the legal arrangement for the Supreme Court of Canada in a number of respects. In Canada, the Registrar is appointed by the government and serves during the pleasure of the Government.⁸ In Australia, the chief executive officer is appointed "upon the nomination of the

Court.”⁹ In Canada, it is the Registrar who runs the Court, subject to the direction of the Chief Justice.¹¹ It is the Chief Justice in Canada who therefore controls the administration, although in practice there is consultation and members of the court are involved in some aspects of administration. In Australia, in contrast, the Chief Justice is not specifically mentioned in relation to administration. Rather, it is the Court itself that administers its affairs. Further, the Court in Australia has control of its building. It has, by statute, power to buy and sell real property and to control and manage any land or building occupied by the Court.¹¹

Other federal courts in Australia were given administrative autonomy in 1989.¹² The Attorney General described the transfer of authority as follows:¹³

The effect of this Bill is to transfer from the Attorney-General's Department to the courts and the Tribunal responsibility for the supervision of their own financial management and practices and for the courts and the Tribunal to take control over the management of their other administrative affairs. Self-management will mean that the courts...will be free to make their own decisions in human and financial resource management. This will maximise the flexibility of the courts and the Tribunal to cope with changing pressures and priorities throughout each year.

Thus, the Federal Court (consisting of an industrial and a general division), the Administrative Appeals Tribunal, and the Family Court of Australia were given a large measure of administrative autonomy. But unlike in the High Court, it is the Chief Justice who has the administrative authority, not the Court itself;¹⁴ and the courts do not have power to acquire land or to manage land or buildings occupied by the Court. No doubt, these changes were made because of the size and the various geographical locations of the courts. The Family Court of Australia, for example, which started in 1976, consists of over 50 judges.¹⁵

Budgets of all the Australian and New Zealand courts are still controlled by the Government through the attorney general's departments. A former chief justice of Australia, Sir Harry Gibbs, pointed out in 1983 that the government, therefore, still has a strong influence on judicial administration: “The Court must still depend on Parliament for its annual budget, and that means that in practice the Executive can still effectively influence the decision of important matters of administration affecting the Court...It is an illusion to think that legislation such as the High Court of Australia Act has more than a symbolic significance so far as the independence of the Court is concerned.”¹⁶

The recently retired chief justice, Sir Anthony Mason, had suggested that “[d]etermination of court funding by the Parliament, rather than the executive, might alleviate the problem and eliminate this source of conflict with the executive. It would involve a public process of negotiation, in contrast to the present process of private negotiation, and might also involve more direct participation by the Chief Justice in the process of negotiation than occurs under the existing system.”¹⁷ As far as I am

aware, no government in Australia or New Zealand has adopted the American approach of seeking funding directly from the legislature.

South Australia provides another example of a jurisdiction that has given the courts a very large measure of control over administration. The Courts Administration Act 1993¹⁸ has transferred the administration of the courts in South Australia to a council called the State Courts Administration Council. This Council is composed of three members, the Chief Justice of the Supreme Court, the Chief Justice of the District Court, and the Chief Magistrate of the Magistrates Court.¹⁹ Thus, the Council, presided over by the Chief Justice, is similar to the withdrawn 1993 Quebec legislation.²⁰ It administers one budget for all the levels of the courts. The Act provides that the Council “is responsible for providing, or arranging for the provision of, the administrative facilities and services for participating courts that are necessary to enable those courts properly to carry out their judicial functions.”²¹ “A participating court remains, however,” the section goes on to say, “responsible for its own internal administration.”²² The Select Committee studying the Bill stated: “Self management will mean that the Courts are able to make their own decisions in human and resource management and this will maximise the flexibility of the Courts to cope with changing pressures and priorities throughout the year.”²³ It goes further than the proposed Quebec legislation in that the Council has control of court physical facilities: “All courthouses and other real and personal property of the Crown set apart for the use of the participating courts is under the care, control and management of the Council.”²⁴ And, with the consent of the government, the Council can “acquire and dispose of an interest in real property.”²⁵ The Administrator of the courts is clearly under the control of the Council and cannot be appointed or dismissed without the nomination or concurrence of the Council.²⁶ Budgeting, however, remains under the control of the Attorney-General. The Council prepares and submits estimates to the Attorney General,²⁷ who may approve the budget with or without modification.²⁸ The Council is not permitted to spend money unless “provision for the expenditure is made in a budget approved by the Attorney General.”²⁹ Further, the Act provides that a member of the Council or the Administrator must, on request, appear before a parliamentary committee and answer questions relating to expenditures, financial needs or any other matters affecting the administration of the courts, but not adjudicative matters.³⁰

This was not the first innovation in court administration adopted by South Australia. In 1981, the State had separated the administration of the courts from the Attorney General’s Department by the establishment of the Court Services Department, a separate department of government.³¹ Thus, the service was not closely connected with other roles and responsibilities of the Attorney General, such as public prosecutions. There was, it seems, “substantial satisfaction”³² with the arrangement. It can be compared with the new Agency status of court administration in England.³³ In 1991, New South Wales also adopted this technique of a separate Courts Administration Department.³⁴

The idea of having the courts and their physical facilities administered by a Council had been advocated by the chief justice of South Australia, L. J. King, for a number of years.³⁵ The Attorney General, however, had been sceptical, preferring a partnership model.³⁶ In the end, the Attorney General and the government were, in the words of the Attorney General at the official opening of the new scheme,³⁷ "influenced by" the 1991 report by Church and Sallmann, *Governing Australia's Courts*, produced for the Australian Institute of Judicial Administration.³⁸ Thomas Church was a visiting American professor and Professor Peter Sallmann was the Executive Director of the Institute. Church and Sallmann stated that their "findings lean heavily toward a judicially autonomous model, the structure and precise details of which need to be worked out by the leaders in particular jurisdictions to suit their particular requirements."³⁹ They recognized that "an issue of major concern in any potential move to a more autonomous administrative structure for the courts would be the maintenance of confidence of each level of court in the fairness and broad-mindedness of the body which will ultimately govern the court system."⁴⁰ They suggested "carving out a generous portion of control over internal administrative matters and vesting it in the individual courts."⁴¹

The government obviously saw this as a way of achieving a number of objectives. The Attorney General firstly mentioned financial responsibility: "This will mean the judiciary ensuring that the courts operate within the appropriation provided by Parliament and being answerable to Parliament through the Presiding Officer of the Authority, the Chief Justice, for the conduct of the Authority."⁴² This was a warning not to come back for supplementary funding. It also, he stated, provides coordination of the activities of all levels of court: "The legislation enables the judiciary to manage the allocation of resources in a coordinated way, across the whole judicial system."⁴³ He added that there is an obligation on the judiciary to get their independent house in order, and he mentioned in particular "inappropriate behaviour or the expression of attitudes and views which do not reflect contemporary social realities in Australia,"⁴⁴ "long delays in delivering judgments"⁴⁵, "codes of conduct, more effective means of peer review and continuing legal and other educational programs."⁴⁶ So a *quid pro quo* would seem to have been expected.

Most states in Australia as well as New Zealand⁴⁷ apparently still use the traditional executive model, whereby the Attorney General's Department runs the courts. Church and Sallmann examined the traditional approach in the State of Victoria⁴⁸ and found a "them and us"⁴⁹ attitude often found in Canadian jurisdictions. They go on:⁵⁰

We also found an absence of *esprit de corps* among court administrators and the lack of an appropriate career path in judicial administration. The judicial officers, for their part, have many complaints regarding administrative issues, and seem unhappy with the *status quo*. In both branches, we frequently encountered a mood of beleaguered frustration. We did not comprehensively survey judicial and administrative opinions but if the views expressed to us were in any way representative, then clearly the Victorian system is operating at much less than an optimal level of performance.

A partnership will only be successful when both sides of the relationship are committed to it, and are prepared to work at maintaining it. We did not detect a strong interest among Victorian administrators in involving judicial or court officers in policies and decisions they were used to handling themselves; and there was certainly no move to involve the judiciary, even informally, in the selection of the top departmental officials who have managerial responsibility for providing administrative services to the courts. It is also fair to say, however, that we observed only isolated pockets of interest among the judiciary (aside from chief judicial officers) in assuming responsibility for the many administrative matters now handled almost exclusively by the executive.

To them, it is an inherent problem in the executive model that each side is reluctant to intervene. They quote Millar and Baar, who state:⁵¹

Regard for the independence of the judiciary has tended to make judges hesitant to participate in executive department reform efforts, and executive departments wary of intervening in judicial administration affairs. A mutual reluctance to tread in the no-man's-land between the ill-defined borders separating executive and judicial authority has retarded initiative, reform, and modernization of court administration.

Chief Justice King stated at the official opening of the South Australia scheme: "The system which we inaugurate today is unique in this country in that it involves a single judiciary based administration for all the Courts of the State. If successful, it will become a model to be emulated in the other States which are closely watching our performance."⁵² The model, it should be added, is being watched by other countries as well.

9. U.S. FEDERAL COURTS

Canadian and Australian writers often refer to the American system, where the judges administer the courts. It perhaps comes as a surprise to learn that for the most part this did not occur in the federal system until 1939, and in the states until much later.

The Administrative Office of the U.S. Courts was set up in 1939.¹ Before then, it was the Department of Justice that gave administrative support to the U.S. Courts through the U.S. Marshals.² The Department of Justice was responsible for developing and presenting the appropriations request for the courts, administering the funds appropriated, and administering the personnel system of the courts. Russell Wheeler, the present deputy director of the Federal Judicial Center, has written that "the realization that courts were separate functional entities and needed some measure of autonomy and control...came about around the turn of the century."³ The concept was given a boost when Roscoe Pound, Louis Brandeis, and others stated in a 1914 report that "the court should be given control of the clerical and administrative force through

a chief clerk, [appointed by and] responsible to the court for the conduct of this part of the work.”⁴

Giving the judiciary administrative authority over the courts had been advocated by the American Bar Association in 1936⁵ and had been adopted by Connecticut in 1937.⁶ But it was mainly the reactions to the Roosevelt court-packing episode that helped overcome judicial concern about centralizing power and caused its creation in the federal court system.⁷ The U.S. courts thus became free from Department of Justice oversight.

A Director of the Administrative Office is appointed by the Chief Justice of the United States Supreme Court, after consultation with the Judicial Conference of the United States, and serves during pleasure.⁸ The Office is responsible for administering all the federal courts except the U.S. Supreme Court, which has its own administrative structure. The Office operates under the direction of the Judicial Conference rather than the Supreme Court. Chief Justice Hughes apparently wanted this arrangement, amongst other reasons, so that possible improprieties in other federal courts would not reflect on the Supreme Court.⁹

The Judicial Conference had been established by Congress at the urging of Chief Justice Taft in 1922 and was made up of the Chief Justice of the United States and the nine senior circuit judges of the then nine circuits.¹⁰ The Conference¹¹ now has 27 members, including the Chief Justice, 13 chief judges of each circuit, 12 district court judges selected by the puisne judges of each circuit, and the chief judge of the Court of International Trade.¹² By statute it must meet annually; in practice it meets at least twice a year. In 1934, it should be added, the judges got more authority over rule-making. The Supreme Court could propose rules, but Congress kept final authority to veto changes to national rules.¹³

In 1967, the Federal Judicial Center was created as a separate agency for research and education.¹⁴ With an annual budget today of over \$18 million and a permanent staff of over 150 persons,¹⁵ it assumed responsibility for the ad hoc research and education that Conference committees had been doing.¹⁶

As is well known, the U.S. federal judiciary has grown enormously, and many have argued that the growth should be curtailed to, perhaps, under 1,000 judges. In 1950 there were 277 federal judges; today there are about 850. Court personnel per judge is now over 28 persons; in 1960 it was 16. (Federal court budgets include, for example, probation officers.) The federal judicial budget is now close to \$3 billion, having grown over 1,000% in the last 20 years. The assessment of the need for more judges emanates from the Judicial Conference. Congress is not, of course, under any obligation to approve an increase.¹⁷

The 1939 legislation also decentralized the administration of the courts by creating a judicial council in each circuit.¹⁸ Administration of the courts was given to the Circuit Judicial Councils to help ensure that the work of the district courts was “effectively

and expeditiously transacted.”¹⁹ At first, the councils consisted only of appeal court judges and were mandated to meet at least twice a year. Membership was broadened to include district court judges in 1980, and then in 1990 to include an equal number of circuit judges and district judges, plus the chief judge of the circuit as chair.²⁰

Prior to 1939, the financial operations of the federal courts were centred in the Department of Justice. It was the Department of Justice and the Bureau of the Budget officials that formulated and presented requests for funds to Congress.²¹ Today, the federal judiciary itself takes on this task. The budget is submitted by the judiciary under the authority of the Judicial Conference of the United States. The recommendations are largely the work of its Budget Committee (one of the Conference’s standing committees) and the Administrative Office. The budget is then sent to the Office of Management and Budget and is incorporated without change in the President’s budget, which is sent to Congress. The Office of Management and Budget is prohibited by statute from changing any of the budgetary requests submitted by the Judicial Conference.²²

There are, in fact, a number of budget submissions. The Supreme Court prepares its own budget and sends it separately. Other submissions involve the Administrative Office, the Federal Judicial Center, and the Court of International Trade. But it is the budget submission for the circuit courts of appeal, district courts, and other judicial services that constitutes over 90% of the budget for the federal judiciary.

Congressional budget committees receive the President’s budget. The budget works its way through the two Houses. Hearings are conducted by subcommittees of the House and the Senate Appropriations Committee. In the case of the lower courts, it is the Budget Committee of the Judicial Conference, supported by the Administrative Office, that assumes primary responsibility for the presentation and defence of the requests. The budget is then approved by the full House Appropriations Committee and the House itself. The budget also goes to a Senate Appropriations Subcommittee, the full Committee, and then the Senate. The Senate has often restored cuts made by the House. Differences between the product of the House and the Senate are settled by a Congressional Conference Committee. The members of the Judicial Conference’s Budget Committee are, of course, carefully selected to enhance the likelihood of a successful outcome. A study published in 1985 states:²³

A review of the backgrounds of judges serving on the committee indicates that each has had special attributes to enhance the effectiveness of the committee in communicating with Congress...Having judicial representatives who are constituents and often friends of key members of Congress ensures that the views of the judiciary will receive congressional attention. Appointing judges with legislative experience means that the Budget Committee will possess the political knowledge to formulate effective strategies for obtaining favorable actions from Congress.

10. U.S. STATE COURTS

The states were not quick to adopt the federal model, although as we saw in the last section, Connecticut had adopted a similar model in 1937.¹ Arthur Vanderbilt, the influential Chief Justice of New Jersey, was behind a constitutional amendment in 1947 that effected a major reorganization of the New Jersey judiciary, including the creation of the Office of Administrative Director of the Courts, appointed by the Chief Justice. The American Bar Association also supported the concept and promoted the adoption of the "Model Act to Provide for an Administrator of the State Courts," which the Conference of Commissioners of Uniform State Laws promulgated in 1948. But, by 1950, only seven states had introduced judicially supervised state court administrative offices. The American Judicature Society started actively supporting the idea in the early 1950s. Twelve state court offices were established in the 1950s, 13 in the 1960s, and 26 in the 1970s.² There is, as one would suspect, substantial variation in these offices.

There is also great variation in budgeting practices from state to state.³ Only a little over half the states have assumed primary responsibility for funding their courts.⁴ Most of the funding for the trial courts in Illinois, Texas, and Washington, for example, is entirely local. New York, on the other hand, funds all trial courts.⁵ In terms of actual budgeting practices, one observer, relying on Carl Baar's work, has stated:⁶

The majority of states treat the judicial branch much as any other state agency in the preparation of the budget. Judiciary budget requests are submitted to executive budget officials who review and revise the requests, and incorporate the revised requests into the final budget submitted to the legislature. The remaining states either permit the judiciary to submit its budget request directly to the legislature or require the judiciary to submit its request to the executive, which then must transmit the request to the legislature without revision but subject to the executive's recommendations.

Some American state courts have been experiencing serious cutbacks in funding. The American Bar Association's 1992 Special Committee on Funding the Justice System⁷ did a national survey of state funding and concluded in dramatic terms that "the justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding."⁸

Some courts have turned to the use of the concept of "inherent powers" to try to force the state to provide greater resources. The conflict in New York between Chief Judge Wachtler and Governor Cuomo, to be discussed below, is the best-known example. In 1994, the National Judicial College published a survey of the use of inherent powers throughout the United States.⁹ Carl Baar's introduction points out¹⁰ that this survey is nearly triple the length of a similar survey done 14 years earlier by the College. The doctrine has been used by the courts for a wide variety of purposes: issuing rules of practice and procedure; determining courtroom decorum; providing for jury expenses;

appointing counsel for criminal defendants; and filling support positions and compelling the local legislature to fund them at adequate salaries.¹¹

It has also been used for major budgetary battles. The Pennsylvania Supreme Court, for example, ordered the City of Philadelphia to restore approximately \$2.5 million cut from the budget submitted by the Philadelphia Court of Common Pleas.¹² The Supreme Court of Pennsylvania stated:¹³

[T]he judiciary *must possess* [emphasis in original] the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent branch of our government.

One recent commentator has stated that the case is “the furthest expansion of the doctrine” thus far.¹⁴ The courts have not been as reluctant to grant orders requiring a city or county to provide facilities as when the relief is claimed against the co-equal state government. Some state courts have developed ways of limiting the trial judges’ discretion to make such orders; others have worked out arrangements to resolve budget conflict, particularly when it involves the county level.¹⁵

In 1992, to take another important example, the Los Angeles County Bar Association sued California State officials claiming that statutory limitations on the number of superior court judges in Los Angeles County violated guarantees of due process and equal protection under the 14th Amendment of the U.S. Constitution. The Federal Ninth Circuit held that the U.S. Constitution was not violated, but concluded that the dispute was justiciable, leaving open the possibility of future relief by the federal courts.¹⁶

The Wachtler-Cuomo controversy was being played out at about the same time.¹⁷ Chief Justice Wachtler had submitted the judiciary’s budget to Governor Cuomo in late 1990. In New York, the Governor must incorporate the request in his or her budget submitted to the legislature without revision, although the Governor is entitled to give his or her own recommendations. In this case, in line with other cuts, Cuomo recommended a reduction of 10% from the judiciary’s request. So instead of an increase of \$70 million as requested by the judiciary, there was a decrease of \$25 million from the approximately \$900 million budget for the courts. The Chief Justice sued the Governor, stating that there is a constitutional obligation to fund the courts adequately. The Governor attempted to block the proceedings by resorting to the federal courts. U.S. District Judge Jack Weinstein would not dismiss the lawsuit, but urged the parties to avoid “an unseemly conflict”¹⁸. In early 1992, the case was settled on the basis that the Governor would restore the level of funding of the previous fiscal year.

The New York suit is the only one to date to test the viability of the inherent powers doctrine in a direct confrontation between co-equal branches of government over a global budget. I'll leave it to the American commentators to say who won the dispute. One recent article suggests that if negotiation fails, "courts may find themselves unable to marshal the kind of public support they need to 'win' an inherent powers dispute that unfolds on a state level."¹⁹ Another commentator stated in *Judicature*: "...by using inherent powers as a weapon to coerce a coequal branch of government to fund the courts at a judicially mandated level, the courts undermine the public confidence and interbranch cooperation on which they ultimately depend...The ultimate implication of *Wachtler v. Cuomo* is that all parties emerge as losers in an inherent powers conflict of this nature, no matter what the legal outcome of the exercise."²⁰ On the other hand, the president of the New York State Trial Lawyers Association²¹ thinks that constitutional litigation is desirable in such cases, stating: "In times of state budget deficits, the judicial budget is a vulnerable target for attack...[T]he most effective remedy is litigation in the form of a constitutional challenge...The inherent power argument can be used effectively if, as in New York, the person bringing the lawsuit can persuasively argue that the lack of funding is so great that it has deprived the judicial branch of its ability to effectively perform its duties under the state constitution."²²

If one views the courts as institutions that must automatically accept all cases, then cutting budgets is unacceptable. This was apparently the view of Chief Judge Wachtler of New York and Chief Justice Lucas of California. The latter stated in 1991: "Requiring the judicial system to 'share the burden' along with everyone else ignores the fact that the judiciary is a separate, co-equal branch of government. As Judge Wachtler noted, 'The judiciary does not have programs that can be cut, or even facilities that can be closed down. And it must, by law, accept every case filed.'"²³ But others argue that the judiciary must make their case in public debate in competition with other demands for public resources. One recent commentator states:²⁴

As baby-boomers age and the number of people requiring services such as health care and retirement protection from publicly funded sources increases, underfunding of courts may also increase. Questions about the level of justice a state can afford may then demand to be answered in public debate, unencumbered by the expanding jurisprudence of inherent judicial powers.

Russell Wheeler put it this way in 1988 before the California and New York controversies arose:²⁵

It is axiomatic in republican government that the legislature makes decisions about gathering and appropriating funds. Despite the long-standing interest in inherent-powers orders to compel the expenditure of funds necessary for judicial operations, few believe the judiciary could maintain itself by such orders. Rather, adequate support for the judiciary must derive from the judiciary's ability to compete successfully for funding in the legislative arena.

11. OTHER CANADIAN INSTITUTIONS

The Deschênes Report examined 16 non-judicial Canadian agencies, stating: “We wished to compare their situation with that of the courts, and to see what further lessons might be drawn from this added experience.”¹ Other reports, such as the 1993 Report of the Quebec Task Force on the Administrative Autonomy of the Courts of Justice² and the 1992 Ontario Joint Committee on Court Reform’s Report on Ontario Court Administration³ similarly examined non-judicial agencies for ideas. Deschênes looked at three federal agencies, the Auditor General, the Canada Council and the Canadian Human Rights Commission; two in Ontario, the Ontario Council on University Affairs and the Ombudsman’s Office; two in Atlantic Canada, the Auditor General of Prince Edward Island and the Board of Commissioners of Public Utilities of Nova Scotia; as well as other agencies in Quebec and Western Canada.⁴

The Report states that “there are doubtless several hundred such agencies in Canada.”⁵ Indeed, the numbers likely reach the thousands. The 1994 Ontario Government’s 500-page *Guide to Agencies, Boards and Commissions of Ontario* states that “there are approximately 716 agencies to which the provincial government makes appointments.”⁶ There are agencies that give advice, that operate a business or program, and that make decisions of a regulatory or administrative nature. They are classified into various schedules depending on their function and their degree of independence.⁷ It is obviously not possible to analyse these agencies in depth. The most I can do is look at some selected agencies.

“Almost all the agencies we interviewed,” observed Deschênes, “are administratively more independent than the courts.” “The judicial power,” he concluded, “demands no more, but deserves no less.”⁸ Let us examine some governmental agencies to see the type of independence they possess and the extent to which they can serve as possible models for the judiciary.

Persons who want separation of the courts from the executive point to a number of bodies that, in most jurisdictions in Canada, come under the wing of the legislature rather than the executive. These include the Auditor, the Ombudsman, the Elections Commissioner, and the Freedom of Information Commissioner. Let us examine in some detail the Auditor General.

The Auditor General of Canada and the provincial auditors understandably have a great amount of independence from the executive—more than any other government-funded non-judicial institution. They are officers of the legislature rather than the executive, and they report at least annually to the legislature. The appointments are normally for fairly lengthy periods, with remuneration that is not under the control of the executive, and with early removal only by the legislature with cause. In most cases, it is the legislature, not the executive, that establishes the budget for the office.

The Saskatchewan legislation dealing with the provincial auditor can serve as a model for the discussion. The auditor is appointed by the Cabinet after consultation with the Chair of the Standing Committee of the Legislature on Public Accounts. There is no fixed term of office. The appointment is as "an officer of the Legislative Assembly" and the person holds office during good behaviour.⁹ Ontario also does not have a fixed term, but the auditor can be removed only for cause by the Cabinet "on the address of the Assembly"¹⁰. The person is also appointed by the Cabinet "on the address of the Assembly"¹¹. Quebec's auditor is also appointed and dismissed on a motion by the legislature, but in Quebec's case the motion must be passed by at least two-thirds of the members of the National Assembly.¹² The appointment is for ten-years and is non-renewable. Alberta provides for an eight-year appointment on the recommendation of the assembly, with eligibility for reappointment.¹³

Saskatchewan also tries to maintain the independence of the auditor by not giving the executive control over the auditor's salary. The pay is set at "the average salary of all the deputy ministers and acting deputy ministers of the government of Saskatchewan."¹⁴ The Ontario auditor's pay range is set "within the highest range of salaries paid to deputy ministers", and the actual pay within the range is set by the legislature's Board of Internal Economy.¹⁵ Quebec's auditor gets the salary of the highest-paid deputy minister (with the exception of the Secretary-General of the Cabinet).¹⁶ The federal auditor general gets the same pay as a puisne judge of the Supreme Court of Canada.¹⁷ The Alberta auditor's pay is set by the Select Standing Committee on Legislative Offices.¹⁸

The Saskatchewan legislation, as do the other Acts, gives the auditor authority over the hiring of staff and the expenditure of funds.¹⁹ The staff are not public employees.²⁰ As in the other Acts, there is a provision for auditing the auditor.²¹ Unlike in some of the other provinces, nothing is said in the legislation about who reviews the auditor's estimates. The Act simply states that "any sums required by the provincial auditor for the purposes of this Act are to be paid from moneys appropriated by the Legislature for the purpose."²² As a matter of practice, however, the estimates of the auditor are reviewed by the legislature's Board of Internal Economy.²³

Ontario specifically provides that the legislature's Board of Internal Economy²⁴ will review the auditor's annual estimates and lay them as altered before the Assembly.²⁵ Quebec's auditor also submits the estimates to the legislature's Office of the National Assembly, and after examination and possible amendments are made, the estimates are incorporated into the estimates introduced in the National Assembly.²⁶ Alberta's legislation is similar.²⁷ By statute, the Quebec auditor may make a report to the National Assembly if he or she considers the estimates, as amended, to be insufficient.²⁸ The federal auditor general's estimates, in contrast, go through the normal Treasury Board route, but as in the Quebec legislation, "The Auditor General may make a special report to the House of Commons in the event that amounts provided for his office in the estimates submitted to Parliament are, in his opinion, inadequate to enable him to fulfil the responsibilities of his office."²⁹

The auditor general is a possible model for the judiciary. The model is certainly a desirable one for the auditor general, who is constantly in opposition to the spending practices of the government. It should be remembered, however, that the auditor is also not a very expensive office in comparison with the judiciary, and there is normally just one physical location. The annual budget of the Ontario auditor is about 8 million. The same is true of a provincial ombudsman, election commissioner, and privacy commissioner. The 1994 annual budget for the Ontario Ombudsman is less than \$10 million.³⁰ Moreover, the executive still has a large measure of control over the annual budget, even though it is a legislative body and not the executive that goes over the estimate. Legislative Boards of Internal Economy are controlled by the government.

When one turns to the other agencies there is clear ultimate government control of their operations, even though they may run their own show on a day-to-day basis. The control is through the appointment process and the budget. One can take almost any agency and see that this is true. The boards of cultural agencies are dominated by government appointees. This is true, for example, of the Canada Council,³¹ the C.B.C.,³² the Art Gallery of Nova Scotia,³³ and the Royal Ontario Museum.³⁴ Fifteen of the 21 trustees of the Royal Ontario Museum are three-year (renewable) government appointments.³⁵ The importance of the short-term appointment process as a method of accountability is often forgotten by those who wish comparable administrative and budgetary independence.³⁶ The government controls legal aid bodies, such as the Ontario legal aid plan, by requiring the Attorney General's approval of the director and other staff,³⁷ by a government-appointed advisory committee that reports at least once a year to the Attorney General,³⁸ and, of course, by the budget supplied by the government.³⁹ British Columbia's legal aid plan is also controlled by the funds allocated, and by making half the members of the board of directors Cabinet appointments.⁴⁰ The Bank of Canada has a great amount of autonomy in its operations, and the governor has a seven year appointment.⁴¹ But the Bank is under the management of a board of directors, all appointed by the government for a relatively short, three-year (renewable) term.⁴² Similarly, the boards of crown corporations are dominated by government appointees.⁴³ Further, in spite of the seeming independence of bodies such as the Law Reform Commission of Canada⁴⁴ and the Economic Council of Canada,⁴⁵ there is, as we know, nothing legally to stop the government from abolishing them.

There is also a group of agencies that deal with individual claims, such as the certification of unions, the right to trade securities, or to remain in the country as a refugee. These types of boards—a labour relations board, securities commission, or immigration appeal board⁴⁶—cannot get too far away from government policy because of the power of the appointment process. Although no terms are specified in the legislation for the Ontario Labour Relations Board or the Ontario Securities Commission, the renewable terms are usually for about three years.⁴⁷ The chairperson and members of the Immigration and Refugee Board are appointed for a seven-year term.⁴⁸ Some have argued for longer terms in these types of agencies. The Quebec Bar Association wants lifetime appointments to administrative tribunals.⁴⁹ The head

of the Administrative Judges of Quebec has proposed instead that the government be required to show cause why it will not renew an appointment.⁵⁰

This is not the place to have a lengthy discussion of the independence of administrative tribunals. I will leave that to others.⁵¹ It should be noted, however, that there are some interesting developments going on through the judicial Charter route.⁵² These in turn have had an effect on general administrative law principles. The courts have not been reluctant to extend s.11(d) of the Charter—the requirement of an impartial and independent tribunal—to administrative tribunals. In one recent case, the Quebec Court of Appeal held that the fact that the Competition Tribunal has contempt powers brings the tribunal within s.11(d) of the Charter.⁵³ And section 7 of the Charter has been applied to the Immigration Appeal Board because the person concerned was subject to deportation if his refugee claim was denied.⁵⁴ Further, McLachlin J. stated in a prison discipline case⁵⁵ that “[P]rocedural protection for inmates affected by disciplinary measures is more properly to be found in the more flexible guarantees of s.7 than in s.11 of the Charter.” A very recent important Supreme Court of Canada case, *Matsqui Indian Band v. Canadian Pacific*,⁵⁶ has applied the *Valente* concepts of independence and impartiality to administrative tribunals, although in a flexible manner, via the rules of natural justice.

One institution that most closely approaches the judiciary in terms of the desirability of independence and an arms-length relationship with government is the university.⁵⁷ Very large amounts of government money are given to universities in Canada each year. The government, for example, contributes almost a half a billion dollars a year to the University of Toronto alone. Yet, unlike the judiciary, the universities run their own shows. How are universities able to do this? How are they accountable for these vast sums given to them? The simple answer is that they have a board of governors or a governing council made up of a large component of government appointees.⁵⁸ The 12-member Board of Governors of the University of Saskatchewan, for example, has 7 persons on the Board who are not directly connected with the University, 6 of whom are appointed by the Cabinet.⁵⁹ The University of Alberta, to take another example, has 13 persons from outside the University, including 8 appointed by the Cabinet.⁶⁰ And so on across the country.

A 1993 Ontario government-sponsored report on university accountability⁶¹ recommended a strong outside membership component as a necessary aspect of accountability. The Task Force stated:⁶²

An accountable university governing body should be comprised of both persons who are members of the institution, internal members, and persons who are not. Accountability to society is strengthened if a majority of the members are drawn from outside the institution. The principle of external majority applies both to institutions with a bi-cameral structure and to those with a unicameral structure. For institutions with a bi-cameral structure, the Task Force recommends that at least 60% of the membership be external and at least 30%

internal. For institutions with a unicameral structure the percentage of external members might be less so long as they comprise a majority.

The Education Minister has accepted the recommendation.⁶³ This would have required only a small change in the University of Toronto's governing structure. The Governing Council now has an equal number of internal and external members, and the University has argued that it is important symbolically to keep this equality.⁶⁴ In a response to the report of the Task Force on accountability, the University of Toronto repeated the argument made to the Minister a year earlier:⁶⁵

...we believe that in our unicameral system the equality of internal and external estates is an important symbol. Our processes of governance must be informed by the University's commitment to its mission—to be an internationally significant research university, with undergraduate, graduate and professional programs of excellent quality. Where the responsibility for academic policy does not rest directly in a senate, the senior (unicameral) body must be the expression both of a self-governing academic community and a vehicle for public accountability. Accountability and academic governance must operate simultaneously and in harmony, and must be seen to be doing so both externally and internally. The equality of internal and external members is an important symbol of this congruence.

We will return to the university model in the next section.

12. CONCLUSION

We have now looked at a great variety of possible models. Before analysing them, it may be useful to set out some general considerations that should be kept in focus.

Need for a buffer. The first is that there should be some separation or buffer between the judiciary and the Attorney General, the chief litigator before the courts.

Control over one's work environment. It was argued in the introductory section that people work more effectively if they have control over their work environment. So a move to greater autonomy is desirable as a matter of effective administration, even though, as we have seen, it is not constitutionally mandated under *Valente*.¹ It might not assist some puisne judges, however, to have control of administration simply transferred from the government to the chief justice. Some means of giving puisne judges more say in the running of the courts would therefore be a wise move.

Three levels of courts. It is also desirable to have the three levels of courts, the court of appeal, the superior court, and the provincial court, working together. There are ways of sharing resources and streamlining the pretrial and trial process that can best

be accomplished if the three levels of courts are administered as a system and if the judges themselves are responsible for making the system work more effectively.

Decentralization. Even though the courts should be treated collectively for budgetary and administrative purposes, it is desirable to delegate to each court—to the extent possible—the actual administrative decisions that affect the particular court. The more that decisions are made by those who have to live with them, the better the decisions will tend to be and the greater the acceptance of the decisions.² There is also likely to be a more cost-effective use of resources. Moreover, by decentralization, there will be less fear that the administration will be dominated by one level of court. Further, the *Valente*-type of adjudicative decisions should be—indeed, constitutionally probably must be—handled by each court separately.

The administrator. It seems unwise to have the chief administrator reporting to both the judiciary and the Attorney General. It would be better to have the reporting made to one of the institutions on specific matters and even better to have the administrator reporting only to the judiciary. The administrator's remuneration should be fixed by a formula in the same way the auditor general's is determined so that the administrator is not constantly looking to the executive for career advancement.

Ambiguity. A certain amount of ambiguity in the dividing line between the judiciary and the executive and in the role of the administrator is not necessarily undesirable. Dean Hugh Arnold of the University of Toronto's Faculty of Management Studies put it this way in a seminar in March, 1993, to the Canadian Judicial Council:³

The issue of matching authority and responsibility is a bit of an old saw in the classical management theories that say if a person is given responsibility for some area of activity he or she must be given the necessary authority to accomplish the desired results. Otherwise, you put people in an impossible situation of being held responsible for results without having sufficient control. The argument is appealing on the surface but, in reality, the challenge for organizations is to discover how we can most effectively share resources and deal with the ambiguity that there is only a finite amount of authority to go around. If we want to encourage greater levels of responsibility throughout the organization, the real challenge, being faced by private sector organizations in increasingly competitive markets, is how we find ways of effectively sharing resources, of working collaboratively, and of dealing with ambiguity. The manager who insists that he or she must have total control of all resources necessary to carry out his or her responsibilities is, in my experience at least, an individual who is unlikely to be successful in the more fluid, more flexible, more rapidly changing organizations that exist today.

Part of the justice system. The courts are just one part of the justice system, particularly with respect to the criminal law. But even civil law cases are just one important part of the dispute resolution business. The government will necessarily have an interest in the entire justice system to ensure a proper coordination of the system as a whole.

including the judiciary. In the criminal law, the intake by the police, the determinations of prosecutors, and the functioning of legal aid obviously affect the work of the courts. And the decisions of the courts with respect to sentencing will affect the need for correctional facilities. Thus, there has to be close coordination between the administration of the courts and the other parts of the justice system. The person selected as the administrator should have an understanding of all aspects of the justice system to play an effective role. The person will therefore have to be paid a sufficient sum, perhaps equal to that paid a superior court judge or a senior deputy minister, to attract the right person.

Government money. There will have to be effective methods of accountability for the large sums of government money involved. Of course, the provincial auditor would play his or her usual auditing role. But more is needed to ensure that appropriate tradeoffs are made by the judiciary. This may require some neutral persons, such as in a university governing board, to be part of the process. A government would never hand over to university professors the unaccountable power to spend the funds allotted by the government. If the government does not have this type of neutral board accountability, it will insist on it in other ways, such as by having control over the administrator or by setting out precise budget amounts and not permitting transfers between accounts without permission.

Funding process. Estimates should be prepared initially by the judiciary. Many would like the budget to then go to the legislature or, alternatively, to the legislature via the Treasury Board.⁴ In my view, it would be a mistake to eliminate the Attorney General or the Minister of Justice from the process. An Attorney General can usually appreciate the needs of the judiciary better than a legislative committee. The Minister has a strong stake in the justice system and can usually effectively argue the case for resources in competition with all the other demands on government resources, including lowering the deficit and reducing taxes.⁵ One should find other ways of establishing a buffer between the Attorney General and the judiciary. It should not be forgotten that the present funding system, whatever its defects, has over the past few decades been reasonably good to the judiciary. A little over 25 years ago—to add a personal note—I visited every jurisdiction in Canada to study the resources of the magistrates' courts for the Ouimet Committee.⁶ It was a grim picture. The courts were often housed in basements or as an adjunct to police stations. I wrote: "For the most part, the lower courts in the larger urban centres in Canada operate with neither dignity nor efficiency."⁷ On my visits to courts across the country in connection with the present project, I was impressed with the facilities for the courts in almost every major city I visited. Coincidentally, during the same period I visited a number of courts in New York state in connection with another project. There, as we have seen, the funding is done by the legislature. The Governor passes on the request to the legislature. Nevertheless, it seems clear to me that the resources devoted to the judiciary and its supporting facilities in Canada are in general superior to those in New York state.

Not fixed in stone. The arrangement made by each province should be subject to change and adjustment by the government. The fact that some authority is given to the judiciary should not mean that it cannot then be changed by the government. We are concerned about effective management and non-constitutional principles of judicial independence. *Valente*⁸ did not mandate this form of institutional independence. There is a danger, of course, that the judiciary will resist any return to an earlier system, claiming that it infringes on the "evolving" constitutional right to independence. Perhaps any transfer of responsibility should be initially for a limited time period, say, five to ten years.

Uniformity. There is no necessity for each province to adopt the same solution. Local conditions and individual personalities might dictate different results.

In the light of the above considerations, let us examine some possible models.⁹

One could continue with a cooperative model, such as is found in many courts across Canada. One problem with this model in some jurisdictions is that each court has its own cooperative arrangement with the government, and there is no coordination of the judiciary as a whole, which in my view is desirable. Moreover, the cooperative model may mean that each side is reluctant to intervene in changing the present practices. The judiciary may say it is the responsibility of the government, and the government may be reluctant to step on the toes of the judiciary. Further, cooperative models mean face-to-face meetings between chief justices and deputy ministers and their officials. These meetings, out of the glare of publicity, however well they may work, are not conducive to establishing the required appearance of independence. They are, however, better than not having such communication. When it is all levels of the judiciary meeting periodically with the deputy and other officials, as in the Yukon, Manitoba, and Ontario, it is better than meeting separately with each court. But, in my view, the system requires perhaps too much contact between the government and the judiciary.

The new English model of a separate agency to run the court services is worth exploring if the cooperative model is maintained. A separate agency somewhat removed from the Attorney General's Department may be better than the present system, provided that there are incentives to ensure cooperation and consultation with the judiciary. As discussed in an earlier section, this may be a promising avenue.

The Supreme Court of Canada is a good model for a court of appeal, but it is more difficult to apply to all levels of the judiciary. In our examination of the proposed 1993 Quebec legislation, we saw some of the problems in transferring all the power to the three chiefs. There will be suspicion and jealousy amongst all the groups that one or two of the chiefs will dominate the others. And the puisne judges will fear the power of the chiefs. It would be more workable if the transfer was to a body which contained puisne judges as well as chiefs and which also contained neutral non-governmental persons who could mediate between the competing demands of each court.

Another possibility is to establish a memorandum of agreement between the Attorney General and a single court or all the courts. The unique arrangement made in 1993 between the Ontario Provincial Court and the Attorney General is a great improvement over the earlier system. It cuts down on the day-to-day friction with the government and gives the judiciary control over some aspects of their work environment, particularly for the chief judge and the regional senior judges. It allows adjustments when either the chief judge or the Attorney General changes. It does not, however, coordinate the work of the various courts. But Ontario continues to have meetings amongst officials and the three chiefs.

All the above schemes are preferable to having the Attorney General run the courts without the involvement of the judiciary. But in my view the following model would be even better.

The model would establish a Board of Judicial Management—to choose one amongst many possible names—consisting of judges and various appointees. The Board would act much like a governing board of a university and would appoint the administrator, would divide the allocated budget amongst the various courts, would attempt to streamline and coordinate the work of the courts and the use of their resources, and would prepare the budget and seek the requisite funding for the judiciary.

Each reader will have his or her own view of the composition of such a Board. My view is that it should be fairly small and consist of, say, 12 or 13 members. Included on the Board would, of course, be the three chiefs (associates could be there as observers) and three puisne judges selected by the puisne judges of each court. I would envisage that there would be three lawyers chosen in most provinces by three key legal groups, the Law Society, the provincial Canadian Bar Association, and the Law Deans. There would also be three or four lay persons chosen by the government. No doubt the government would look for persons with good management skills, while at the same time being sensitive to the need for diversity on the Board.

Some would prefer equality between the judicial and non-judicial members, in which case there would be three government appointees, for a total of 12 members. I would prefer four government appointees, giving the non-judicial members the absolute majority of places. And I would select a non-judicial member as chair, just as in a university it is usually a public figure not connected with the university who chairs the board. The chair, particularly if the non-judicial members were equal in number to the judicial members, would have the deciding vote in the case of a tie vote. Such a scheme would permit the presentation for funding to be formally made by the chair and the administrator, with the judiciary remaining officially somewhat in the background. No doubt, some would prefer the Board to be chaired by the chief justice of the province, but I think the Board would be more effective if it were not chaired by the head of one of the courts competing for funds.

Each court would have the responsibility of handling its own matters connected with adjudication. The administrator would thus report directly to the chief justice or chief

judge of each court on such matters without reference to the Board. There could be other matters that are handled by each court separately, on the principle that decentralization tends to be more effective in these situations. Memoranda of Agreement could be worked out between each court and the Board.

There would be many other matters that would have to be worked out. I would think that representatives of some key government departments (for example, the Attorney General, the Solicitor General, Public Works, and the Treasury Board) would be entitled to attend as official observers, unless specifically excluded. Another issue is labour relations. It may be on this issue that negotiations should be handled by those who would not possibly be hearing any case resulting from a dispute. Staff, although answerable to the administrator, should be public servants, with the possibility of transferring out of the court service. The administrator, as discussed above, should have a very senior position, at least comparable to that of a senior deputy minister. Naturally, the provincial auditor would examine the activities of the Board. Other questions involve the extent to which meetings should be open ones and the dividing line between matters handled by the Board and those, such as sheriff's operations and the collection of fines, which should, perhaps, remain with the attorney general's department.

Estimates would be prepared by the administrator and approved by the Board. As previously stated, I would think it better if they continued to go through the Attorney General. No doubt, inadequate funding would be publicly commented on by the Board as well as by the chiefs. The estimates would be kept separate from the other estimates of the Attorney General. There should be an obligation for the judiciary to stay within the allotted budget. This is not always easy, however, in smaller jurisdictions, where one long drug conspiracy trial can wreak havoc with a budget. And there can always be an *Askov*-type¹⁰ bombshell in the middle of the year. So, there should be the possibility of supplementary estimates. It would be wise to have some reasonable short-term guarantees by the government about minimum levels of funding to allay the fear by the judiciary that the transfer of responsibility is simply designed to involve the judiciary in managing severe budget cuts. Indeed, without such an understanding, the scheme may not get off the ground. Another possibility to be considered is to approach a transfer in stages, perhaps after developing good management information systems and gaining greater knowledge of how such a body would operate.

Both the Deschênes and the Zuber reports also suggested a Board composed of persons other than the chiefs. The model suggested here differs from the Zuber recommendation in several respects: Zuber's Ontario Courts Management Committee did not include any puisne judges; had three senior officials of the Attorney General's Department on the Committee; and had the Chief Justice of Ontario chair it. He had, however, an equality of membership between judges and non-judges on the 10-member Committee.

Deschênes did not give an exact composition for his Judicial Council. He suggested that there be no more than 12 members. His model differs from the one suggested above in that the judges would constitute the majority of the members; the government

would have no part in making appointments to the Council; and the budget would not go through the Attorney General or even the Treasury Board, but would go straight to a legislative committee. For the reasons stated earlier, I think that the government should have the power to appoint persons to the Board, but they should not be government employees, although it is arguable that the deputy attorney general should be one of the persons appointed. Further, I would have the Board's estimates continue to go to the legislature via the Attorney General.

In March, 1995, the Ontario *Civil Justice Review*, co-chaired by Justice R. A. Blair and assistant deputy attorney general Sandra Lang, adopted a unified governing body approach, stating "the court system can no longer function effectively in Ontario unless and until a single authority, with clear lines of responsibility and accountability, is established to determine all administrative, financial and budgetary, and operational matters relating to court administration in the province."¹¹ Their report therefore strongly recommended "that steps be effected immediately to establish a single issue task force—comprised of representatives of Government, Judiciary, Bar and Public—mandated to develop an implementable proposal for the creation of a unified administration, management and budgetary structure for the justice system in Ontario."¹²

The scheme suggested here—or some variation of it—has the potential for providing better, more accountable court administration by clearly assigning responsibility for administration in one place. Further, it creates a mechanism for the three levels of courts to work together and brings together in one body representatives of the public and those most knowledgeable about the courts, the judges themselves. In my view, the scheme should be carefully examined by the provinces.

CHAPTER TEN: CHIEF JUSTICES AND THEIR COURTS

1. INTRODUCTION

In the last chapter, we looked in detail at the relationship between the judiciary and the government. In this chapter, we examine the relationship between the chief justice and the members of his or her court.

How much authority should a chief justice have over members of the court? Chief Justice Lamer stated in *Lippé*, a 1991 Supreme Court of Canada case: “members of the court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice.”¹ A Chief Justice of the Supreme Court of Canada sitting on an appeal will, however, try to convince a fellow judge of the rightness of his or her opinion. This is not, of course, considered improper. What if reserved appeal judgments are circulated to all members of the Court of Appeal, including the chief justice, for comment before being released? This occurs in Alberta and again would not be considered improper by most observers. Obviously, it would be improper, for example, for a chief justice to threaten to deny a benefit or to give an unwanted assignment to influence a decision.

And almost everyone would agree with Zuber J.A. in his 1987 Report: “This Inquiry emphatically rejects the notion that no one can tell a judge when, where, how long or how often he or she must work, and in what capacities.”² Zuber went on to say, however: “The fact that an individual would have the authority to manage his or her colleagues on the bench would not prevent a management approach of consultation and consensus.”³ We will return to the concept of collegiality later in this chapter.

A number of puisne judges have, however, expressed concern about the potential power of the chief justice or chief judge. How widespread this concern is I do not know. One superior court judge in a reported speech at Dalhousie Law School stated: “[T]he attribution of more and more power to Chief Judges may well have the effect of making the judicial ideology of the Chief Judge the only truly independent ideology on the court...Will the new powers of the Chief Judges be confined to judicial administration? What of their power to control trips, travel and the education of judges—even the power to allocate desirable and undesirable cases to punish judges can represent a threat to judicial independence. Every increase in power to a Chief Judge over others might be seen as a threat to judicial independence.”⁴ A superior court judge on the west coast recently made the same point: “Chief Justices are now entitled to run a superior court in any way they think fit. They are appointed until age 75. On the basis of past appointments, they may rule a court for periods of up to 30 years. They are accountable to no one...Those judges that are known to support the policies of the Chief Justice often serve on a number of committees. Those that don’t

are quietly overlooked for committee assignments...A Chief Justice may approve or disapprove any application by a judge for sabbatical leave with or without reasons.”⁵ Another judge wrote to me about the wide discretionary powers of chief justices and concluded that the best approach is “don’t make any waves”. The complaint is also made by provincial court judges, one of whom stated recently in a carefully researched Master of Laws thesis: “The opportunities for interference exist because of the unique nature of the chief judge’s administrative authority and investigative, disciplinary and supervisory duties.”⁶

Chief justices can exercise their inherent power to manage the court and, as Zuber J.A. stated, also use consultation and consensus.

2. HISTORY OF CHIEF JUSTICES

The first Canadian chief justice, Jonathan Belcher, was appointed Chief Justice of Nova Scotia in 1754.¹ The second, Chief Justice William Gregory of Lower Canada, had the mission of implementing the Royal Proclamation of King George III of 1763, which implemented the new Courts of Justice.² Chief Justice William Osgoode became Upper Canada’s first chief justice in 1792, leaving to become chief justice of Lower Canada in 1794.³

Provincial courts (formerly magistrates courts) did not have chief judges or even so-called senior judges until much later. The first senior judge in Quebec was appointed for the district of Montreal in 1909,⁴ and the first senior judge in Ontario was appointed for the City of Toronto in 1922. It was not until the funding of the administration of justice was centralized after the 1968 McRuer Report that a chief judge was appointed in Ontario.⁵

The specific legislative language for provincial court chief judges varies from province to province. The British Columbia Act states, for example, that “the chief judge has the power and duty to supervise the judges.”⁶ The Manitoba legislation is slightly different and gives the chief judge “general supervisory powers in respect of judges”⁷, and the Prince Edward Island legislation states that the chief judge has “the power and duty to administer the provincial court.”⁸ Quebec says that “the chief judge has the direction of the Court” and assigns three functions: “(1) to ensure that the general policy of the Court in judicial matters is applied; (2) to coordinate, apportion and supervise the work of the judges, who must comply with his orders and directives in that regard; and (3) to ensure that the judicial code of ethics is observed.”⁹ There does not appear to me to be much difference in the interpretations that should be given to the different language used. The author of the Master’s thesis referred to earlier surveyed the chief judges in Canada. All who responded (10 out of 13)¹⁰ believed their duties included supervision of their judges.¹¹

There are fewer legislative guides for federally appointed provincial chief justices.¹² As the 1981 "Report on the Status and Role of the Chief Justice in Canada", prepared for the Canadian Institute for the Administration of Justice, stated: "Governments have preferred in Canada to establish the position of Chief Justice with a paucity of specific statutory authority."¹³ The C.I.A.J. study interviewed chief justices across Canada and stated: "During our interviews we asked all the Chief Justices if they were of the opinion that their statutory powers needed to be expanded. Somewhat curiously, all except one answered that this was not necessary, nor even desirable."¹⁴

Some provinces do have specific legislation, however. As set out above, for example, the Quebec Courts of Justice Act states that the chief judge has charge of "the general policy of the Court in judicial matters" and that the chief judge shall "coordinate, apportion and supervise the work of the judges, who must comply with his orders and directives in that regard."¹⁵ Another province that specifically provides for the powers of the chief justices of the superior courts is British Columbia. A 1969 statute provided that "the Chief Justice shall have general supervision of the Court and has all powers, duties, and authority necessary for the proper administration of the work of the Court."¹⁶ Further, an amendment in 1973, as noted above, stated: "The Chief Justice has general supervision of the judges of the court."¹⁷

There is undoubtedly inherent power in chief justices to administer their courts in the absence of specific legislation. As one of the background studies for the U.S. National Commission on Discipline stated: "the power to monitor judicial conduct may be inherent in the position of chief judge."¹⁸ The same is even more true of the assignment of cases. The B.C. changes are therefore probably not a significant change in direction.¹⁹

3. SOME FOREIGN MODELS

The U.S. federal courts and some courts in Australia give the court itself greater powers than Canadian courts have.

Federal Circuit Judicial Councils were established in the United States in 1939 and were given responsibility for overseeing the administration of justice in the circuit, for considering complaints of judicial unfitness and taking necessary action, and for reviewing numerous administrative measures and plans.¹ Authority was placed in a group of judges rather than the chief judge. Supreme Court Chief Justice Hughes stated that the trial judges (district court judges) therefore "would not feel that they were dependent upon a single individual."² There was then no chief judge; rather, each circuit had a senior circuit judge. The title chief judge was not introduced until 1948.³ The appeal court (circuit court) judges met at least twice a year. Subsequently, district court judges were added to the Council in 1980 and were given an equal number of places as circuit court judges (excluding the chief judge) in 1990.

There has been considerable interest in the American model of court governance in Australia. As far as I can determine, it has not been actively pursued in England. The nineteenth century English Judicature Acts had given the judges collectively responsibility for administration. McGarvie J., then of the Supreme Court of Victoria and now the Governor of the State of Victoria, states:⁴

The position at common law was recognised and placed in statutory form by the framers of the Judicature Acts last century. Those Acts expressly placed the power and responsibility for the administration of the courts in the Council of Judges, a meeting of all the judges.

Unfortunately the judges, whether possessing the power by statute or common law, seem seldom to have exercised it or accepted the responsibility it involved.

Through disuse, the power, so essential to judicial independence, wasted and often disappeared. In England and Wales the Supreme Court allowed the Council of Judges to pass into desuetude and, apparently with little or no judicial resistance, it was formally abolished by the *Supreme Court Act* 1981. Recently, realising the extent of its loss, the English judges created a non-statutory judicial council for the Supreme Court.⁵ While useful, it is likely to be but a pale shadow of a statutory judicial council.

But the Supreme Court of Victoria resurrected the Council of Judges in 1983. McGarvie J. states:⁶

The Supreme Court of Victoria was fortunate. Although for long periods the Council had performed no functions at all and in recent years functions of marginal importance, the statutory framework for a Council of Judges introduced in 1883 remained. Since about 1983 the Council, consisting of all the judges, has held the view that it should be established unequivocally as the ultimate authority responsible for the administration and operation of the Court. Since then, it has actually exercised the statutory power which remained virtually unexercised for a hundred years.

The Council makes decisions on questions of important policy. If there is a difference, the view of the majority of those present prevails. Between monthly Council meetings, an Executive Committee of the Chief Justice and six elected judges is authorised to act in its weekly meetings on behalf of the Council, making decisions consistently with those of Council. Each of the elected judges holds a portfolio of responsibility for areas of the administration and operation of the Court. The present portfolios are: Judicial Administration; Budget and Planning; Legislation and Rules; Building and Facilities; Staff; and Computers, Court Records etc.

The Chief Justice has the primary responsibility of implementing the decisions of the Council and Executive Committee and administering the Court. In 1986 the Chief Executive Officer was selected by the Executive Committee from a large number of applicants from within and beyond the public service who responded to public advertisements. The Chief Executive Officer is subject to the directions of the Chief Justice and has line authority over court staff.

The High Court of Australia had assumed the responsibility for the administration of the Court in 1980. Section 17 of the Act states: "The High Court shall administer its own affairs subject to, and in accordance with, this Act."⁷ This model was not, however, carried over to the Courts and Tribunals Administration Amendment Act of 1989,⁸ which, as we saw in the previous chapter, transferred administrative and financial responsibility over the Family Court, the Federal Court, and the Administrative Appeals Tribunal from the Attorney General's Department to the courts. But, unlike in the High Court, overall authority was not vested in the collectivity of judges, but rather in the Chief Justices of the respective courts. I am uncertain whether other courts in Australia are considering adopting the High Court and Victoria Supreme Court model.

4. CONCLUSION

In my view, changes are desirable in Canada. The model we have for our superior courts throughout Canada is governance by a chief judge, appointed for life until retirement who has complete authority to administer the court. He or she can assign cases, assign offices, and recommend travel, sabbatical, and other leave arrangements without necessarily consulting with other judges. In fact, many chief justices operate on a collegial basis, as a matter of sound administration, although without any requirement that they do so.

In the previous chapter, I quoted Osborne and Gaebler's book *Reinventing Government*¹ that "people work harder and invest more of their creativity when they control their own work." I later observed: "It might not assist some puisne judges, however, to have control of administration simply transferred from the government to the chief justice. Some means of giving puisne judges more say in the running of the courts would therefore be a wise move."² In the chapter on discipline, I suggested that puisne judges should be involved in the discipline process. And in the previous chapter, I argued that puisne judges should be included in any Board of Judicial Management. However, more should be done.

What can be done to make the court more collegial so that there is real input from the puisne judges? The universities faced similar issues in the 1960s and 1970s. Faculties were run by deans, who were appointed for life and who often ruled in an autocratic manner. Two important techniques changed that approach, term appointments and faculty involvement in the selection of the new dean.

Limited-term decanal appointments usually mean that the head of the law faculty thereafter returns to being a regular teacher. The limit is known when the appointment is made, and thus a dean tends to accept the return and, in many cases, looks forward to it. The effect of knowing that you will be a faculty member again—or a regular judge, if applied to the judiciary—is that your style of administration will tend to be more collegial, more consultative, and less autocratic. A number of provincial courts chief judges now have limited-term appointments. Ontario, for example, provides that the appointment of the chief judges of the provincial court is for six years and cannot be renewed.³ The U.S. federal system now provides that a chief judge's term is seven years. The judge appointed is the most senior circuit judge who is under 65 and wishes to accept the post. The chief judge in the U.S. federal system cannot stay on past age 70.⁴

What is a desirable term? Chief Justice Deschênes recommended in his report a fixed term and suggested the term be set, according to regional needs, between a minimum of five years and a maximum of ten years and not be renewable.⁵ The Canadian Judges Conference's submission to me noted that "*many* [their emphasis] of its members believe that chief justices should be appointed for a fixed term from five to ten years."⁶ Some judges argue for a much shorter period, one suggesting that it be three years.⁷ In my opinion, a seven-year, non-renewable term is probably the most desirable. That is the term set by the U.S. federal system and in my experience it is the most desirable for a dean. It is long enough to allow one the opportunity to accomplish one's agenda and to get to know the job well. It is usually sufficiently short that one is not bored by the recurrence of the same issues again and again. Five years is probably too short. It goes by very quickly and, moreover, one is just learning the ropes in the first year and is somewhat of a lame duck in the final year.

More and more chief justices are now returning to the position of puisne judge without embarrassment. It should be the standard practice. The position of Chief Justice of the Supreme Court of Canada, however, may involve different considerations, but even there, why should it not be possible for a person to go back to the court and for another judge of the court to become the chief justice?⁸ The present legislation permits a judge to return to the court as a puisne judge at a puisne judge's salary. But this cannot be done until after five years.⁹ One wonders why one wants to trap a person in a position that he or she does not want. The legislation should allow such a return at any time, although the pension based on the judge's higher salary should not be available if a minimum period has not been served as chief justice.¹⁰

The present system of choosing a chief justice is an odd one—though most people seem to accept it. If we are really concerned about judicial independence, how can we permit the government alone to choose a chief justice? There is a blatant conflict of interest for every judge who is interested in the position in trying to seem attractive to the government and thus be considered for the position. Note that the selection of the U.S. federal circuit chief judge is not in the hands of the government. Again, the universities may provide a possible solution. A search committee for a new dean is established to recommend a name to the board of governors. The committee is made

up of the various estates: faculty, representatives of other faculties, university officers, alumni, and students. Some have suggested an election amongst the members of the court,¹¹ but that would assume that it must be a selection from the court and that only judges have an interest in the selection. Moreover, their interest may be to choose someone who would leave them alone, and that may not be what is needed in that court.

A search committee for a chief justice could, perhaps, consist of, say, six persons: two judges from that court, a judge from another level of the judiciary, a person chosen by, say, the law society, a provincial deputy minister, a lay member from the suggested judicial management board, and a representative of the federal Minister of Justice, who might be the appropriate person to chair the committee. The committee could recommend a ranked (or unranked) short list of names. Naturally, a certain degree of lobbying would take place, but this happens now. The recommendations could go to the Cabinet, who could reject them, but the fact of rejection (without the specific names) should, I suggest, be made public.

One could go further and give the court itself the major role in administering the court. But there is a danger that this might lead to conflicts, and the collegiality driving the concept might be lost. One has seen this in university faculties and departments that have become *too* democratic. Full and effective consultation but leaving final administrative decisions in the hands of the chief justice is probably better. Many provinces provide for at least yearly meetings of the judges.¹² This is obviously desirable. And puisne judges are normally involved in rules committees. Perhaps legislation could also provide that the chief justice should, after consultation, appoint committees to assist in the administration of the court. One would expect a wise chief justice would want to bring others into such issues as the assignment of cases,¹³ and, what is often more troublesome, the assignment of offices. If there is no consensus in the court on how to handle these issues, there will likely be disgruntled judges. Other respected judges could be involved in handling disciplinary matters and other issues. In talking to judges across the country, I reached the not surprising conclusion that courts in which the puisne judges know what is going on and feel that they and their colleagues are involved in the decisions are probably the more effective and productive courts.

CHAPTER ELEVEN: APPOINTMENTS AND ELEVATIONS

1. INTRODUCTION

No one will question the importance of the subject of this chapter. Its relevance to judicial independence and accountability, however, requires a few words of explanation.¹ In the first place, as discussed in the chapter on discipline, there is a connection between the quality of appointments and discipline. The higher the quality—using the word quality in a *wide* sense and not limiting it simply to legal skills—the less that later disciplinary action will be needed.² Further, weak appointments lower the status of the judiciary in the eyes of the public and create a climate for interference with the necessary independence of the judiciary. Similarly, political appointments that are seen by the public as not based on merit may cause some to worry about the judge's future independence and impartiality on the bench. As the Manitoba Law Reform Commission stated, appointments that are a reward for political services “may precipitate the belief among both the public and the legal profession that...judges, having attained their position as a result of the government's favour, are therefore obligated to that government, in a manner which might undermine the independence of the judiciary. The effect on public confidence in the legal system could be corrosive.”³ There is, of course, nothing improper in appointing a person who had been involved in politics. Indeed, knowledge of the political process can be an advantage for a judge. The key question, however, is whether the appointee has the other skills and qualities needed in a judge.

The appointment process, as political scientist Ian Greene recently observed, “can be thought of as a front-end mechanism of accountability.”⁴ He goes on to say: “An appointment procedure that results in the selection of the best possible candidates for judgeships in the first place is therefore necessary to promote the optimum judicial performance.” Finally, the subject has direct relevance to judicial independence in two specific areas: elevation to a higher court and part-time appointments. Is the present system of elevation, in which the decision is solely in the hands of the government, consistent with judicial independence? Are part-time judicial appointments constitutionally permissible in Canada? Let us start with a description of present and past practices in Canada, England, and the United States before exploring further options.⁵

2. FEDERALLY APPOINTED JUDGES

A. History

Section 96 of the British North America Act, now the Constitution Act,¹ gives the federal government the power to appoint judges to the higher provincial courts: “The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province...” The administration of justice was, however, given to the provinces. Section 92(14) of the Constitution Act provides for exclusive provincial legislative authority over the following subject matter: “The Administration of justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction.”²

How did it come about that there is this unnatural separation of authority over the judiciary? It was clear that the provinces would insist on keeping authority over the administration of justice.³ In the Act of Union of 1840,⁴ uniting Upper and Lower Canada, the judicial structures were kept separate, and, as Professor William Angus notes, “any future federation would be obliged to recognize the provincial claim of Lower Canada to administration of its own civil law system.”⁵

But why was the appointing power not given to the provinces as well? Perhaps the main reason is that the key players in Confederation who were moving on to the federal stage wanted to keep patronage over appointments in their own hands.⁶ At an early stage of the deliberations leading to Confederation, one delegate, Sir Samuel Tilley, had urged the delegates to consider “the adoption of some measure which should entirely remove these appointments from the influence of party politics,” but another participant privately observed in a letter to the Colonial Secretary that the recommendation met with little enthusiasm; “considerable reluctance,” he wrote, “was exhibited by several of the legal members of the conference to forego prizes now apparently within their grasp.”⁷ The delegates argued that better appointments would come from the federal government. If appointments were made by the local legislatures, it was stated, “the Bench would be speedily filled with obscure and incompetent men who would excite the contempt, instead of commanding the respect of those practicing before them.”⁸ Sir Hector-Louis Langevin stated in the united Parliament that the provinces would use the appointing power for political purposes: “To get rid of an inconvenient member who might have three or four followers, the Local Government would have to take this troublesome advocate of the second, third or fourth order of talent, and place him on the bench, whilst by leaving these appointments to the Central Government, we are satisfied that the selection will be made from men of the highest order of qualifications, that the external and local pressure will not be so great, and the Government will be in a position to act more freely.”⁹

Although the arguments appear persuasive, it is not clear whether the federal appointments turned out to have been better than provincial appointments would have been. The federal cabinet appointments continued to be political and were strongly

criticized over the decades.¹⁰ One writer, for example, stated in 1872: "The system is radically bad: for in lieu of good lawyers, worn-out politicians are placed on the bench. If a man is a political failure, presto he is made a judge...Thanks to that system, the Bench of Quebec does not command the respect which is accorded to persons occupying judicial positions in other countries."¹¹ The Supreme Court of Canada did not fare much better in its first two decades. An editorial in the *Canadian Law Journal* in 1895, for example, stated that "the opinion of the profession is that though the Supreme Court contains much valuable judicial material, it is not the strongest, does not command the greatest confidence, and is in many respects most disappointing and unsatisfactory."¹² One editorial writer in 1904 stated: "The time for boasting of our system as compared with the elective system as worked out in the state of New York seems to be at an end...It would seem rather a shameful thing for us that the electors of a democratic country should show more sense of responsibility in such an important matter than the Ministers of the Crown in a comparatively conservative community."¹³

B. The Canadian Bar Association

In 1918, the Canadian Bar Association, which had been founded in 1914, adopted the following resolution of its Standing Committee on Administration of Justice and Legal Procedure:¹⁴

Judicial Positions — Appointments to the Bench through political exigencies or financial necessities of the aspirants should be discouraged, and legal attainments and other judicial qualities should be sought in making such appointments. The present method, it is alleged, is the result of the patronage system, and it is strongly urged that these appointments should be independent of patronage control and that recommendations from the Bar Associations and Law Societies as to the fitness of those available for such positions should be solicited and should have weight.

In 1930, R. B. Bennett was both the prime minister of Canada and president of the Canadian Bar Association. In his presidential address, he advocated appointments solely on the basis of merit, stating:¹⁵

And I, speaking as a member of the Bar and as a member of the parliament of this country, condemn any departure from the only just rule of selection, and state unequivocally that so long as I have power to influence it, the appointment of our judges will be made with regard only to their real qualifications for the exalted position they must occupy in the proper administration of our laws, and upon which, in my humble opinion, in no small degree depends the maintenance of our Canadian civilization.

Two years later, he sadly acknowledged that it was difficult to fulfil his promise, stating:¹⁶

Secondly, and I am saying this in no over-critical sense or as indicating one party more than another, there has been too much political patronage concerned in appointments to the Bench. The result has been that the test whether a man is entitled to a seat on the Bench has seemed to be whether he has run an election and lost it...It is also true that in this country there has been a very great deal of criticism with respect to judicial appointments because it has been felt in few cases has the test been the merit of the appointee. To get away from that in a new democracy is not an easy thing. No one knows the difficulty better than I.

Unlike in England, where the appointment is made on the recommendation of the Lord Chancellor (or, for senior appointments, the Prime Minister) without going before Cabinet, in Canada, the appointment is made by the Governor General on the advice of the Cabinet. Although the name is put forward by the Minister of Justice in the case of all federally appointed judges with the exception of chief justices and members of the Supreme Court, where the Prime Minister makes the recommendation, the formal decision is made by the Cabinet.¹⁷ This necessarily risks introducing strong political considerations into the selection.

In 1949, the Canadian Bar Association unanimously passed a resolution stating "that the Government of Canada be requested to consult with a committee consisting of the Chief Justice of the Province and the Chief Justice of the Trial Division and representatives of the Benchers of the Law Society in the province mentioned before making any appointment to the Bench of that province."¹⁸ The available statistics back up the C.B.A.'s concerns. Prior to 1949, 22 (55 percent) of the 40 Supreme Court of Canada judges had at some point in their careers been elected politicians, although very few appointed since then have been elected to or defeated for public office.¹⁹ Professor R. C. B. Risk looked at all federal judicial appointments in Canada from 1945 to 1965 and concluded that "all but a few of the judges appointed during the period [1945-1965] were affiliated with the party in power at the time they were appointed, and most were actively engaged in politics."²⁰ In 1957, the C.B.A. changed its approach and recommended that the Cabinet be eliminated from the process, but nothing came of this.²¹

Changes in the process did not come about until the 1966 annual meeting of the Canadian Bar Association established its National Committee on the Judiciary, based upon the 1952 American Bar Association's Standing Committee on the Federal Judiciary. From 1967 on, following a commitment made by Pierre Trudeau, the then minister of justice, the committee was consulted by the Minister of Justice on most of the federal judicial appointments. The C.B.A. Committee would report on names submitted by the Minister of Justice that the candidate was "very well qualified," "well qualified," "qualified," or "not qualified" for the court in question.²²

The Landreville Affair helped bring about this change, just as it had brought about changes in the discipline process, as we saw earlier.²³ Retired Supreme Court Justice Ivan Rand's Report was made public in August 1966, just before the annual C.B.A.

meeting. Several months earlier, the Canadian Association of Law Teachers had called for new procedures,²⁴ and, just before that, a debate had taken place in Parliament in which the government was called upon to “devise a system of appointments that will free judges once and for all from the cloud of political partisanship.”²⁵ Landreville had clearly been a political appointment.²⁶

A number of steps were taken in the late 1960s and in the 1970s to improve the process. Sound appointments, pledged John Turner as minister of justice, would be his “top priority”, and he personally sought out strong candidates.²⁷ One N.D.P. member stated in the House: “I am rather proud of the present Prime Minister and the present Minister of Justice because of the appointments they have made to the bench...They have attempted to make appointments on a non-political basis.”²⁸ Otto Lang, the next minister of justice, established the position of Special Advisor on appointments, whose major responsibility was to receive and obtain recommendations and information with respect to potential judicial appointees.²⁹ Within a two-week period early in 1973, Lang’s Special Advisor, Ed Ratushny, later observed, the Minister announced the appointments of Charles Dubin, Willard Estey, and G. Arthur Martin to the Ontario Court of Appeal and Jean Beetz and Fred Kaufman to the Quebec Court of Appeal.³⁰

Many persons were still worried about the process. Professor Angus stated that the view of the Canadian Bar Association’s National Committee “will be coloured by an establishment conception of desirable professional and judicial qualities.”³¹ Svend Robinson referred to “the rather incestuous nature of the present consultation process with the Canadian Bar Association.”³² Ramon Hnatyshyn, who would later be responsible for establishing a new system, suggested in the House that greater reliance be placed on the recommendations of provincial bar associations and law societies because “the Canadian Bar Association tends to represent the large metropolitan areas of the country.”³³

The 1982 Charter of Rights and Freedoms focused public attention on the law-making role of the judiciary and therefore the importance of the appointment of good judges. Ramon Hnatyshyn, still in opposition, suggested in the House in 1983 that “in light of the enactment of our new Charter of Rights, we may have cause to consider what provisions we may adopt in our own country to allow elected representatives—possibly Members of Parliament or other elected officials representing various regions of our country—the opportunity of considering the social, philosophical or other views held by those nominees before their appointment to the highest court in our land is made final.”³⁴ The importance of appointments to the Supreme Court of Canada had been—and continues to be—the subject of controversy. There have been many schemes, from the Victoria Charter in 1971 up to the Charlottetown Accord in 1992, designed to find a way to involve the provinces in Supreme Court appointments.³⁵ These proposals had spill-over effects on the overall appointment process. Professor William Lederman, for example, proposed a system for the Supreme Court of Canada as well as for the appointment of other federally appointed judges, whereby there would be standing federal-provincial bodies, composed almost entirely of elected government and opposition members of the federal Parliament and of the relevant

provincial legislature, who would prepare very short lists for the government to choose from.³⁶ Lederman's proposal was made, however, before the enactment of the Charter.

There are now, therefore, "competing visions of constitutionalism."³⁷ As Professor Katherine Swinton stated in 1988: "No longer is the Constitution's primary focus the allocation of powers to competing levels of government, for the Constitution Act, 1982 also limits the powers of those governments in the interests of individual and group rights and freedoms."³⁸ A way would and will have to be found to arrive at a solution that recognizes each of these visions. As political scientist Alan Cairns states: "To structure the appointment process too exclusively towards the concerns of governments, especially provincial, as Meech Lake arguably does, will delegitimize the Court for the passionate Charter activists, while to go too far in the other direction is simply to delegitimize the Court for another set of prominent actors who will not go away—provincial governments. While a compromise between these competing concerns will not be easy to fashion, it must be assiduously sought."³⁹

In the mid-1980s, a new push was made for developing a different system. As often happens, it was triggered by a particular incident. Just before the 1984 election, the Trudeau government appointed six Liberal politicians to the bench. In one of these cases, the C.B.A. Committee had been by-passed completely, for the first time since its establishment in 1967.⁴⁰ "The vulnerability of the appointing process to the personalities and whims of the governing party which this episode so vividly demonstrates," wrote Peter Russell, "is a strong part of the case for a more enduring institutional reform: that is, for the establishment of true nominating commissions."⁴¹ Brian Mulroney had made the appointments an election issue and in 1985 announced that the Minister of Justice was undertaking a complete review of the appointments process, leading to the institution of a new system for the appointment of judges at the federal level.

In 1985, both the Canadian Bar Association and the Canadian Association of Law Teachers (C.A.L.T.) recommended that nominating councils in each province be established. The C.B.A.'s Committee, chaired by E. N. McKelvey of New Brunswick, with Professor Peter Russell as the Director of Research, produced a thorough analysis of the existing system in its report, *The Appointment of Judges in Canada*.⁴² "[T]he practice of appointing the party faithful to the bench," the Committee stated, "has been all too common."⁴³ The Committee concluded that the "present system of selection and appointment at the federal level is, in several respects, overly dominated by political considerations."⁴⁴

The C.B.A. Committee recommended a seven-person committee in each province and territory. A committee would submit a short list of not fewer than three names for each appointment. The report concluded:⁴⁵

A committee would be consulted by the federal minister of justice on all vacancies occurring in its province and would submit to the minister the names

of no fewer than three people qualified to fill each position. Committees would consider names suggested by the minister and by other sources, and should also seek out names of candidates themselves.

The minister "would be expected to make each appointment from the list supplied or, failing agreement, to ask the committee to bring forward further recommendations."⁴⁶ Proposed elevations, including appointments of chief justices, would also be scrutinized by the committee.

The Canadian Association of Law Teachers adopted the same general approach, stating in 1985 that "the principal defects in the existing system of judicial appointments in Canada, especially at the federal level, are fundamental and systemic and cannot be cured by such palliatives as a C.B.A.-type screening committee or the appointment of a special assistant."⁴⁷ Their solution was similar to that of the C.B.A. report. Each province and territory would have a Judicial Nominating Council. A council's short list for each vacancy would contain no more than five names and the council would be entitled to rank the names in order of merit.⁴⁸ The C.A.L.T. Committee was unsure about the extent to which the Minister would be bound constitutionally to select a candidate from the list submitted and suggested that he or she be statutorily bound to give written reasons to the council for not following its recommendation.⁴⁹

There was a difference between the two organizations in the composition of the nominating councils or committees. The C.A.L.T. proposal was for five persons, nominees of the chief justice, the provincial law society, the federal Minister of Justice, the provincial Attorney General, and a non-lawyer, chosen by the other members of the council.⁵⁰ Not surprisingly, the C.B.A. also included a representative of the C.B.A. on the committee, and it added another lay member.⁵¹ Like the C.B.A., the C.A.L.T. wanted the selection of a chief justice to be handled by the council and implicitly took the same position with respect to elevations.⁵² Both the C.B.A. and the C.A.L.T. recommended a separate council for appointments to the Federal Court of Canada.⁵³

The two bodies differed, however, with respect to appointments to the Supreme Court of Canada. The C.B.A. would have had the regular provincial committee or committees examine the proposed names and would permit the submission of fewer than the three names required for the appointment of other judges. The C.A.L.T., however, proposed a separate council consisting of seven persons, including the Chief Justice of Canada (not a nominee of the Chief Justice) and a nominee of the Canadian Judicial Council.⁵⁴ Both models attempt to strike a balance between the competing visions discussed earlier, that is, between the division of powers concerns and Charter interests. The C.B.A. position was, however, closer to the division of powers vision.

In the end, the two reports were very similar, and the C.A.L.T. decided that the better strategy was to endorse the C.B.A. proposals. William Angus, the chair of the C.A.L.T. Committee, wrote to Neil McKelvey of the C.B.A. just prior to the February, 1986, Midwinter meeting of the C.B.A. that the C.A.L.T. endorsed the C.B.A.'s recommendations "in principle without reservation."⁵⁵ The Minister of Justice was

subsequently notified of this endorsement.⁵⁶ Mr. McKelvey wrote back to Professor Angus, stating that the endorsement “will undoubtedly be of assistance to the C.B.A. in having the recommendations implemented.”⁵⁷

Nothing was done, however, during Mulroney’s first term in office. Professors Peter Russell and Jacob Ziegel studied the appointments and promotions during this period, 1984-88, and concluded that “only marginal improvements were made in the system of selection of judges by the Mulroney government during its first term in office. Political patronage in judicial appointments was still pervasive.”⁵⁸ They stated:⁵⁹

What our tables on political background show is that patronage, or “political favouritism,” to use the C.B.A.’s phrase, continued to have a major influence on judicial appointments during the first Mulroney government. One hundred and eight appointees, just under half the total number (47.4 percent), had a known political association with the Conservative Party...Mr. Mulroney’s government, it would appear, so far as judicial appointments are concerned, did not exercise its options much differently from the Trudeau/Turner Liberal government.

No doubt the Conservatives wanted a period of time to redress the fact that their active supporters had been effectively shut out of judicial office during the long Liberal administration.

C. A New Process

A new process was instituted by Justice Minister Hnatyshyn in the spring of 1988. The system is fully described in a Department of Justice publication that year.⁶⁰ A permanent committee was established in each province and territory, consisting of five members, representative of the bench, the bar, and the general public.⁶¹ The exact composition of each committee was as follows: one person nominated by the provincial law society; one nominated by the provincial branch of the Canadian Bar Association; a *puisse* federally appointed judge nominated by the Chief Justice; a person nominated by the provincial Attorney General or territorial Minister of Justice; and a person (not a practising lawyer) nominated by the federal Minister of Justice. The Commissioner for Federal Judicial Affairs was to receive applications—applications were not required before this time—and submit to the relevant committee the names of those who were technically qualified to be considered for appointment. Some consider the requirement for a full application to be one of the most important features of the new system. The committee in the early years made one of two assessments, “qualified” or “not qualified”. A person deemed not qualified could request reasons for the assessment.

Only initial appointments were scrutinized by the committees. Elevations within the federal judiciary would not be looked at: “it would be inappropriate for the provincial committee,” the Department’s booklet stated, “because of the nature of its composition, to attempt to rate the performance of a judge in office.”⁶² Provincial

court judges wishing an appointment to a superior court would, however, be rated. Assessments would be valid for two years and at the request of the applicant could be renewed. The results, as Russell and Ziegel correctly noted, "bear a superficial resemblance to the committees proposed by the C.B.A. and the C.A.L.T....but the significant fact is that the Hnatyshyn committees were not to be nominating committees. Their function, like that of the C.B.A.'s National Committee on the Judiciary, is not to seek out and develop a short list of the best candidates, but simply to report on whether persons whose names are sent to them from Ottawa are 'qualified'."⁶³

Several changes were made following a review of the procedures completed in 1991.⁶⁴ The committees, instead of using the categories "qualified" and "not qualified", were now to use "recommended," "highly recommended," and "unable to recommend". Further, candidates would no longer be told their classification, although they would be notified of the date they were assessed. Committees would henceforth give to the Minister a précis of the candidate's qualities that caused them to make a positive recommendation. Another change was to ask those making nominations to the committees to give the Minister two or three names from which to choose in order to provide "greater flexibility and balance in the composition of the committees."⁶⁵ As was the case with federal elevations, provincial court judges would no longer be assessed by the committees.

A further review was commenced by Justice Minister Pierre Blais in 1993, but was not completed before the Conservatives left office. It was continued by the new minister of justice, Allan Rock, and a number of modest changes were announced in the spring of 1994. The C.B.A. had once again argued for the 1985 concept of a short list from which the Minister would choose: "The Canadian Bar Association is strongly of the view that the time has come for the Minister of Justice to adopt this recommendation."⁶⁶ As other ministers have done in the past, Rock rejected the proposal. He did, however, publicly undertake not to appoint any person who had not been recommended by a committee.⁶⁷ To cut down on the heavy workload of the committees in Ontario and Quebec and to increase the possibility for interviews, three regional committees were established in Ontario and two in Quebec.⁶⁸

Another change was to increase the number of members of the committees from five to seven by giving the Minister the power to add two more persons, a lawyer and a lay person. According to the Minister, "this will facilitate the appointment of committees that more fully reflect the diversity of society in each jurisdiction and, in the case of lawyer members, of the legal community."⁶⁹ It also, of course, gives the Minister greater input into the committees. Decisions would be kept on file for three years, rather than two, as previously was the practice. The system, according to the Minister, would achieve greater visibility by publishing advertisements about the committees and by having committees produce annual reports. (The first annual report is expected to be published in the fall of 1995.) The process would be improved by requiring more detailed information from applicants, establishing more detailed written guidelines to assist committee members, and encouraging the use of interviews. "Interviews will

not be mandatory,” the Minister wrote, “but their use will be encouraged in those circumstances in which the committees consider them to be both practical and desirable.”⁷⁰ There will be a one year “cooling-off” period for committee members, but not for members of Parliament, as had been recommended by the C.B.A.

The Minister continued the practice of not submitting names of provincial court judges to committees, although he noted that “a clear majority of those consulted favoured committee assessment of provincial court judges who had applied for federal judicial office.”⁷¹ The Minister stated, “for reasons of judicial independence, I feel it would be inappropriate for the advisory committees to be asked to assess sitting judicial officers.” Further, no change was made with respect to other elevations, including appointments to the Supreme Court.

The accompanying chart (broken down by gender) shows statistics for the past four years of the numbers of applications received and of the numbers of candidates recommended and highly recommended and those whom the committee was unable to recommend.⁷² Since the process started, in 1988, there have been on average somewhat fewer than five hundred applications received annually.⁷³ Female applications have increased from 12 percent in 1989 to 26 percent in 1994.⁷⁴

FEDERAL JUDICIAL APPOINTMENT PROCESS

YEAR	APPLICATIONS RECEIVED*			CANDIDATES RECOMMENDED AND HIGHLY RECOMMENDED			CANDIDATES UNABLE TO RECOMMEND		
	M	F	T	M	F	T	M	F	T
1988	328	45	373	109	18	127	169	22	191
1989	394	61	455	165	30	195	190	25	215
1990	227	55	282	91	22	113	115	26	141
1991	373	98	471	122	38	160	207	54	261
1992	377	108	485	160	46	206	180	53	233
1993	310	77	387	92	17	109	106	34	140
1994**	328	113	441	42	15	57	58	14	72
TOTALS***	2,337	557	2,894	781	186	967	1,025	228	1,253

*These figures do not include applications from provincial court and other judges.

**The committees were not operating for much of 1994.

***Some applications are renewed applications by the same persons.

Have the 1988 changes made a difference? One would expect that they have. Professors Russell and Ziegel are now finishing an analysis of Mulroney's second term in office—from 1988 to 1993—and we will have to wait for the publication of their study for an answer.

Many of the issues discussed above will be revisited in the final section of this chapter. We turn now to an examination of provincial judicial appointments.

3. PROVINCIAL APPOINTMENTS

There are more provincially appointed than federally appointed judges in Canada, and there are a wide variety of techniques used for appointing them. In all provinces, it is the Cabinet that makes the appointment.¹ The differences mainly involve the degree to which the government involves other bodies in the process.²

As in the discussion of discipline, it was Ontario's McRuer Report that led the way.³ Chief Justice McRuer's *Royal Commission of Inquiry into Civil Rights* pointed out in 1968 that provincial appointments were usually political ones. "There has been a tradition in Ontario," McRuer wrote, "that there should be a strong political influence in the selection of magistrates [the predecessors of provincial court judges]...There have been isolated cases where one who has not been a supporter of the party in power has been selected for the office, but such cases are unusual."⁴ Legislation was enacted in Ontario in 1968 setting up a seven-person Judicial Council that had as one of its functions "at the request of the Minister, to consider the proposed appointment of provincial judges and make a report thereon to the Minister."⁵ The Council thus acted in much the same way as did the Canadian Bar Association's National Committee on the Judiciary, discussed in the previous section. It reacted to names submitted to it and did not search out or nominate candidates.

The Ontario system was adopted in a number of other provinces and is still the system used, for example, in Alberta and Saskatchewan.⁶ British Columbia also used the B.C. Judicial Council, but, unlike Ontario, it gave the Council the responsibility of collecting and recommending names to the Attorney General.⁷ Six out of nine of the members of the Council are not judges. Candidates apply directly to the Council, which will, it seems, interview each applicant who meets the statutory requirements and will classify the applicant into one of three categories: "recommended for appointment," "decision deferred", or "not recommended". The legislation provides that the Cabinet can appoint only persons recommended by the Council. The Council does not provide a short list for a particular opening and there are apparently "considerably more names than there are actual vacancies so that the list it submits leaves the Minister with some discretion in deciding which names to bring forward to Cabinet."⁸

In 1979, Quebec adopted a different approach.⁹ Each time a judicial vacancy occurs, the Minister of Justice establishes a selection committee composed of three persons: a judge of the court where the vacancy occurs, appointed on the recommendation of the Chief Judge, a lawyer (after consultation with the Bar), and a lay person appointed by the Minister. It did not use its Judicial Council (Conseil de la magistrature), which had been established in 1978.¹⁰ A vacancy is advertised and applications are sent directly to the committee. All technically qualified candidates are interviewed. The Minister is eventually notified of the candidates the committee considers suitable for appointment as judges. In practice, the Minister of Justice makes the appointment from the list of names supplied.

Manitoba did not have an external procedure until legislation was passed in 1989¹¹ adopting proposals put forward that year by the Manitoba Law Reform Commission.¹² A variation of the Quebec scheme was proposed. The Law Reform Commission felt that on balance it was better not to use the existing Judicial Council, stating: “[I]t would be inappropriate to require the Judicial Council to undertake a role in the appointment process and then be faced with the prospect of ordering disciplinary sanctions against a judge whom they may have recommended for appointment. Furthermore, the appointment of judges and the disciplining of judges are very distinct functions; different considerations, calling for different perspectives, apply to each.”¹³ As in Quebec, they recommended “that a committee [of five persons, rather than Quebec’s three persons] should be appointed on an *ad hoc* basis whenever a vacancy occurs or is anticipated in the Provincial Court.”¹⁴ But, departing from the Quebec scheme, which did not state how many names should be put forward, the Commission recommended that “each nominating committee provide to the Attorney General a list of not fewer than three and not more than six names of individuals whom it recommends for the particular vacancy.”¹⁵ The candidates would not be ranked and the Attorney General would have to choose from the list supplied.¹⁶ Manitoba accepted the proposed scheme, except that it expanded the nominating committee to seven persons and appears to have given the committee—it is called the Judicial Nominating Committee¹⁷—more permanence than the *ad hoc* committees proposed by the Law Reform Commission.

New Brunswick provides another possible model, established in 1988.¹⁸ The Minister of Justice has possible candidates screened by eight Provincial Judicial Appointment Review advisors representing various legal groups and courts, plus two lay nominees of the Minister. Names are submitted to all the advisors individually of all those technically qualified to be considered for appointment. The advisors do not meet as a committee. Evaluations are done on an individual basis by each advisor, who rates each candidate as “highly acceptable,” “acceptable,” or “otherwise”. The Minister has made it clear that he or she will “retain the ultimate right to recommend an appointment regardless of a negative assessment by one or more advisors.”¹⁹ When the Minister has selected a name, the prospective appointee will be interviewed by a committee composed of the Chief Justice of New Brunswick, the Chief Judge of the

Provincial Court, and one of the two lay members. The committee will satisfy itself as to the suitability of the candidates.²⁰

The final provincial scheme to be discussed here is the new Ontario Judicial Appointments Advisory Committee, which was put on a statutory basis in 1994.²¹ In December, 1988, Ian Scott, the attorney general for Ontario, established a unique (for Canada) pilot project, a nine-person Judicial Appointments Advisory Committee, chaired by Professor Peter Russell, to recommend provincial judicial appointments to the Attorney General. The Committee's mandate, Scott told the Legislature, was: "First, to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations."²² The 1992 Final Report of the Advisory Committee recommended that the Committee be established by legislation on a permanent basis.²³

The majority of the Advisory Committee are lay persons. In the pilot project, six out of the nine members were lay persons. The legislation increases the size of the Committee, but keeps the lay persons in the majority (seven out of thirteen). The exact composition is two provincial judges appointed by the Chief Judge of the Provincial Court; three lawyers appointed by the Law Society, the Ontario branch of the Canadian Bar Association, and the County and District Law Presidents' Association; a member of the Judicial Council; and seven persons who are neither judges nor lawyers, appointed by the Attorney General.²⁴ No federally appointed judge is on the Committee. It is the Advisory Committee that advertises a vacancy, reviews the applications, establishes criteria to be used by the Committee, interviews a large number of candidates, and for each vacancy gives the Attorney General "a ranked list of at least two candidates whom it recommends, with brief supporting reasons."²⁵ The Attorney General may appoint "only a candidate who has been recommended,"²⁶ although the Attorney General "may reject the Committee's recommendations and require it to provide a fresh list."²⁷

In the Committee's Annual Report for the period ending December 31, 1993, it is noted that from January, 1989, to December 31, 1993, 90 judges were appointed as a result of the recommendations by the Committee, about 35 percent of the total number of provincial judges in the province.²⁸ At any one time, the committee has about 500 to 600 active files, and each vacancy generates about 150 applications.²⁹ Only a portion of the candidates who apply are granted interviews. In the early stages, interviews were given if two members of the Committee so requested. That was later changed to give an interview only if three members so requested.³⁰ A person cannot be selected without an interview. Obviously, Committee members have to spend considerable periods of time on committee work. They are now paid \$100 a day, plus expenses.³¹

One major change from the original practice is no longer to require that the Ontario Judicial Council approve the recommendations. In the 1992 Report, the Committee recommended that the Judicial Council not play a role in the process, stating: "It is distressing to the committee that candidates who are selected according to its published criteria are later assessed by another body applying different criteria...In the opinion of this committee, it is unwise for Ontario to continue with two bodies screening and giving advice on judicial appointments."³² The Ontario branch of the Canadian Bar Association recommended to the government that the Judicial Council continue to retain its role as a secondary filter, pointing out that "of the 74 candidates recommended by the Attorney General to the Judicial Council since the creation of the Committee, seven received negative reports from the Council and in each of those cases the Attorney General declined to recommend the appointments to Cabinet...the Council's power is only advisory; it would seem that the Report's real complaint is with the Attorney General for refusing to ignore a negative appraisal from the Council."³³ The government legislation, however, eliminated review by the Council, but, as previously noted, included a member of the Judicial Council on the Committee.

The Ontario Committee is thus in control of the process and has the effective voice in the selection of provincial court judges. Of course, the government has control of the selection of the lay members, who constitute a majority of the Committee. Moreover, although it is up to the Committee to develop criteria, the legislature has given direction by stating that the criteria should include "assessment of the professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments."³⁴ The Canadian Bar Association-Ontario submission to the government agreed that there should be substantial lay membership, but was "concerned that majority lay membership compromises the technical function of the Committee in evaluating candidates, particularly with respect to 'professional excellence'."³⁵

This writer's impression is that the Committee has improved the overall quality of the provincial court judges. Certainly it has made the bench more representative of the make-up of the citizenry. The 1993 Canadian Bar Association-Ontario brief to the government referred to "the great contribution made by the Committee in the last four years to reformation of the judicial appointment system in Ontario."³⁶ The question is whether such an apparently successful venture can be transferred to federal appointments.

4. ENGLAND

There are proportionately far fewer full-time judges in England than in Canada. As of September, 1993, there were only 1,145 full-time judges and judicial officers from Law Lords to full-time Magistrates in England and Wales.¹ With about half the English

population, Canada has about 2,000 full-time judges, divided roughly equally between provincial and federal appointments. The main reason for the discrepancy between the two countries is the widespread use in England of part-time lay persons to try the less serious criminal offences and the use of part-time lawyers to try civil and criminal matters. We will return to a discussion of part-time appointments at the end of this section.

Appointments—even of High Court judges—are made by the Queen on the advice of the Lord Chancellor, without going before the Cabinet. Even senior appointments (heads of divisions and appeal court judges) that are the prerogative of the Prime Minister do not, it seems, go before the Cabinet. Thus, as stated in an earlier section, there is less opportunity for party political considerations to play a role in the selections than in Canada. Moreover, the Lord Chancellor is normally a leader of the bar and is thus less interested in political favours than a career politician would be. From just after the turn of the century, judicial appointments to the more senior ranks of the judiciary have not been a reward for past political service.² Lord Jowitt, for example, stated in 1953: “I can fairly say that we have established a tradition in which ‘politics’ and ‘influence’ are now completely disregarded.”³ Later knowledgeable commentators have not disagreed with that assessment.⁴

By the end of the Second World War, “the demise of political appointments to the bench had led to an overwhelming interest in success in practice, especially as an advocate, as the ideal quality for appointment to the bench.”⁵ It is this aspect of the appointing process—success as an advocate—that has provoked an interest by many persons in changing the methods of selection. Drawing the judiciary from the ranks of accomplished barristers more or less effectively cuts out solicitors, who comprise the vast majority of the legal profession in England.⁶ It also makes it difficult to appoint a significant number of women and visible minority candidates, because there are relatively few such persons in the ranks of successful barristers from which appointments are normally made.⁷ At the beginning of 1994, there were only 28 women out of 487 Circuit judges, 42 women out of 795 Recorders, and six women out of about 100 judges on the High Court bench.⁸ Further, there were no black or Asian judges on the High Court and only four members of the Circuit bench “who described themselves as members of ethnic minorities.”⁹ Moreover, the system wrongly implies, to use David Pannick’s words, “that because someone is a successful advocate he will therefore make a similar success of being a judge.”¹⁰

In 1992, as we saw in the chapter on discipline, the influential English body Justice proposed “a new independent agency, the Judicial Commission, to supervise appointments, training, complaints and careers.”¹¹ “[T]here needs to be,” the Justice report stated, “a greater openness in appointment, appointments from a broader range of lawyers, a somewhat demystified bench, a more diverse bench, a younger and more flexible judiciary, and one chosen for, and better trained in, the skills of judging.”¹² “The Commission,” according to the report, “would improve the quality of justice by

a more professional selection of judges from a wider pool of candidates on the basis of their judicial skills rather than predominantly on their quality as advocates.”¹³ The “strong combative or competitive streak present in many successful advocates,” the report states, “is out of place on the Bench.”¹⁴

The report asked for greater specificity on the qualities needed in a judge, greater openness and lay involvement, the downplaying of the importance of advocacy skills and the views of the senior judiciary, public advertisements for judicial posts, and greater representation of women and ethnic minorities.¹⁵ The solution recommended was a thirteen-person Commission, seven of whom would be lay persons—precisely the same number and composition as Ontario’s Judicial Appointments Advisory Committee, discussed in the previous section.¹⁶ Indeed, the Justice report mirrors many of the concerns that led to the new Ontario scheme.

Lord Mackay, the Lord Chancellor, was opposed to the Justice report’s concept of a Judicial Appointments Commission, stating in a speech in 1993:¹⁷

I remain firmly against proposals for a Judicial Appointments Commission. In my view they offer no improvement in the quality of appointments. If appointments continue—as I believe they should—to be made on merit alone, it is difficult to see how a Commission would be better placed to reach these decisions. Moreover, I believe that the establishment of such a Commission could, and probably would, impair my direct accountability to Parliament for these matters and expose the appointments system, and ultimately the judiciary itself, to undesirable external pressures.

Nevertheless, in the same speech he outlined a number of changes in the appointments process that moved in the direction of the concerns expressed in the Justice report. He did so, he said, “after consulting the Senior Judges.”¹⁸ The Lord Chancellor announced, for example, that his office would be “devising more specific descriptions of the work of the judicial posts to be filled and of the qualities required”, would progressively introduce “open advertisements for some judicial vacancies” and “the holding of specific competitions”, would introduce “such further measures as may seem appropriate to encourage applications by women and black and Asian practitioners,” would “review the application forms in use,” would “move towards a more structured basis for the consultations which will continue with the judiciary and the profession,” and would “explore further the scope for involving suitable lay people in the selection process.”¹⁹

In May, 1994, the Lord Chancellor’s Department issued a 36-page document entitled *Developments in Judicial Appointments Procedures*.²⁰ The document fleshed out the points that had been made by the Lord Chancellor. It dealt specifically with Circuit and District judges, the bulk of the full-time judges in England. It did not deal with appointments to the High Court or above, where applications are still not used. For

example, it spelled out in considerable detail (five pages for Circuit judges) eligibility and criteria for appointment.²¹ It also proposed time-limited advertised competitions for certain future appointments.²² Interviews for a specific competition would be conducted for selected applicants by one three-member panel, consisting of a member of the judiciary (a sitting or recently retired judge), one of the Lord Chancellor's senior officials, and a lay person.²³ The lay persons for the coming year were to be members of the Advisory Committees on justices of the peace.²⁴

These changes go part-way to meeting the concerns expressed by the Justice report. The government may indeed go further. In 1995, as this is being written, the House of Commons Home Affairs Committee is holding hearings on the appointments process. It has asked for comments from a wide range of bodies, including the Bar Council, the Law Society, the police, the Equal Opportunities Commission, and the Association of Women Solicitors.²⁵ The Law Society, the official organ of solicitors, not surprisingly because of the present dominance of barristers in appointments, is backing an independent Judicial Appointments Commission.²⁶ As Joshua Rozenberg states in a recent book, *The Search for Justice*, "the clamor for reform of the judicial appointments system will not easily be silenced."²⁷ The Labour Party in February, 1995 stated in a consultation paper that if elected it would create an independent Judicial Training and Appointments Commission.²⁸

One feature of the English system, however, that seems to produce agreement is the widespread use of the position of part-time judges as a stepping stone to a full-time appointment. The Justice committee unanimously supported part-time appointments.²⁹ The Lord Chancellor's 1990 pamphlet gave two main reasons for part-time appointments: "One is to assist the work of the courts. The other is to give to possible candidates for full-time appointment the experience of sitting judicially and an opportunity to establish their suitability."³⁰ Some complain, however, that they are too often used to avoid the more expensive salary and overhead of full-time judges, but that is another matter. Lord Mackay stated in 1993 that "save only in most exceptional circumstances, before being considered for a full-time post a candidate must have served part-time in a relevant judicial capacity."³¹ His Permanent Secretary later made the same point: "you can't become a full-time judge unless you have successfully sat for a reasonable time as a part-time judge. Exceptions to this rule are now almost never made. So any barrister, however able and successful, who doesn't apply to sit in some part-time capacity is effectively ruling himself or herself out of consideration for being a judge."³² The part-time positions are eagerly sought. In late 1993, there were more than 1,000 applications pending for Assistant Recorderships, with a need that year of only about 90 appointments.³³ Most Assistant Recorders progress to be Recorders; and some Recorders may go on to be deputy High Court Judges, although appointment as a deputy High Court Judge is not dependent on prior service as a Recorder. If an Assistant Recorder is not promoted within three to five years, the appointment normally comes to an end. A Recorder is required to sit judicially for at least 20 days a year (of which at least 10 must be in one continuous

period) and is not normally allowed to sit for more than 50 days a year.³⁴ This is not a career judiciary in the continental sense,³⁵ but it has elements of a progression through stages. Further, many of the full-time appointments are to the Circuit Bench, where there are many more openings, and Circuit judges are being promoted more frequently to the High Court now than in the past.³⁶

We will return to a discussion of part-time appointments at the end of this chapter.

5. UNITED STATES

We will start our discussion of appointments in the United States with a description of federal appointments. There are at least 40 vacancies on the federal courts each year,¹ a number not dissimilar to the number of Canadian federal appointments.

A. Federal Appointments

The Constitution of the United States provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court...”² As we saw in an earlier chapter, the appointment is for life “during good behavior.”³ The appointing process was a compromise between a plan proposed by Virginia and one proposed by New Jersey. Virginia and the large states wanted the appointing power located in Congress, whereas New Jersey and the small states wanted the appointment by the executive alone. In the last days of the convention, the present system emerged: nomination by the President and advice and consent of the Senate.⁴ Alexander Hamilton gave the following reason for involving the Senate: “It would be an excellent check upon the spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity.”⁵

The Senate confirmation process for Supreme Court nominees is well known because of the lengthy hearing involving Robert Bork in 1987 and Clarence Thomas in 1991. Bork was rejected by the Senate and a wounded Thomas was confirmed.⁶ In the history of the Supreme Court, there have been 29 failed nominations: 12 were outright rejections by the Senate; the rest were either withdrawals or postponements until a new President took office.⁷

The personal appearance of a judicial candidate before the Senate is a relatively recent phenomenon. The first to appear was Harlan Fiske Stone in 1925, but the modern practice of questioning on a wide range of issues did not begin until Felix Frankfurter’s nomination in 1939.⁸ The questioning of Bork and Thomas raised the issue for many persons whether the Senate has gone too far in permitting questioning of the candidate’s ideology.⁹ But both Bork and Thomas were selected because of their

ideology, and as the New York City Bar Association stated: "there is simply no reason—constitutional or otherwise—why the Executive should freely select candidates on the basis of, among other things, their substantive views on judicial issues and philosophy, while the Senate is constrained from evaluating and considering those same views."¹⁰

Most informed Americans would probably agree with one commentator, who observed: "The apparent decorum of the past was achieved at the expense of participation and accountability. Few who viewed the agony and personal tragedies of the Clarence Thomas proceedings can avoid the almost instinctive desire to return to less visible and contentious proceedings, but the stakes are too high and involve the vital interests of too many forces to seek refuge in the ways of the past."¹¹

One change recently introduced by the Senate Judiciary Committee, however, is to close the hearing when dealing with any allegations concerning the nominee's personal conduct. A small part of Ruth Ginsburg's confirmation hearing was behind closed doors.¹² One recent commentator, William Ross, disagrees with this position, stating: "Attempts to close part or all of the hearings are ill-advised because any privacy interest that the nominee might have is outweighed by the public's need to witness proceedings that have so vast an impact on the nation."¹³ Ross argues that the process will not "discourage highly talented persons from accepting judicial nominations" and states: "Few people would allow a vigorous confirmation process to scare them away from such an exciting position as a Supreme Court seat."¹⁴ We will return to a discussion of confirmation hearings in the final section of this chapter.

The above discussion deals with appointments to the Supreme Court. The Senate is also involved in the selection of district trial judges and court of appeal circuit judges. Senators view district judgeships as being of special importance to them and their supporters, and there is often negotiation amongst the various executive departments and the White House to arrive at a mutually agreeable choice.¹⁵ The President has a freer hand in the selection of appeal court judges because judges on these courts are drawn from several states, so no senator has as strong an interest in the vacancy as in a district court position.¹⁶

Since 1952, the American Bar Association has played a role in the selection of federal judges, including Supreme Court appointments. Its participation occurs before a nomination goes to the Senate. A committee, the Standing Committee on Federal Judiciary, representing the thirteen circuits,¹⁷ examines prospective nominees referred to it by the Attorney General. The examination includes a meeting with the candidate. The Committee does not, it is said, consider a prospective nominee's philosophy or ideology, but reviews issues bearing on professional qualification. The investigation of the prospective nominee is usually assigned to the circuit member of the committee in the judicial district in which the vacancy occurs.¹⁸ All members take part, however, in evaluating a Supreme Court nominee.¹⁹ The full Committee rates the

nominee for any court on the following scale: well qualified, qualified, or not qualified. If the President then nominates the candidate, the rating becomes part of the public record in the Senate.²⁰ One federal judge, Lawrence Silberman, has recently expressed reservations about the A.B.A. process, particularly the Standing Committee's "ecclesiastical emphasis on trial work, its relative disregard for other legal expertise, and its positive disdain for nonlegal experience."²¹ The position is reminiscent of the criticism we saw in the previous section concerning the English experience. "It appears never to have occurred to the members of the Standing Committee," Judge Silberman states, "that a strict diet of litigation is not necessarily the best background for a federal judge—particularly at the appellate level."²²

B. State Appointments

In the early years after the Revolution, state judges were appointed, not elected. Of the thirteen original states, eight vested the appointment power in one or both houses of the legislature, and the other five allowed appointment by the governor with the involvement of his council.²³

States gradually adopted elective systems. The appointments were for limited periods rather than life terms. In 1832, Mississippi, influenced by "Jacksonian democracy", became the first state to have an entire popularly elected judiciary.²⁴ By the time of the Civil War, 24 of the 34 states had established an elected judiciary.²⁵ The problem was that selection of the judiciary became the property of the powerful political machines, such as Tammany Hall in New York City. Around the turn of the century, a number of states adopted the concept of nonpartisan elections, whereby candidates appeared on the ballot without party labels.²⁶

A movement started developing for a new system. As in many other areas of the law, Roscoe Pound's famous 1906 speech "Causes of Popular Dissatisfaction with the Administration of Justice" pointed out the problem: "putting courts into politics, and compelling judges to become politicians in many jurisdictions," he stated, "had almost destroyed the traditional respect for the bench."²⁷ The American Judicature Society was founded in 1913 and proposed a plan whereby the chief justice of the state would select candidates from a list proposed by a judicial council. Later proposed plans dropped the central role of the chief justice.²⁸ In the 1930s, the American Bar Association endorsed the concept of using a commission to propose names.²⁹

This "merit selection" plan was first adopted in 1940 in Missouri—hence the concept is often also called the Missouri Plan.³⁰ As of 1993, 32 states (and the District of Columbia) use such plans to aid the governor in selecting some or all of their judicial officers.³¹ The general pattern is described in an American Judicature Society publication as follows:³²

Almost none of the state plans in use is identical. However, there are certain features common to nearly all of them. These elements have become the conventional wisdom of how a commission should be structured and how it should operate. Most include a permanent nonpartisan commission composed of lawyers and nonlawyers (appointed by a variety of public and private officials) who actively recruit, investigate, interview and evaluate prospective candidates. The commission then forwards a list of three to five most qualified individuals to the executive, who in turn is required to make an appointment from the list. Usually the judge serves a one to three year probationary period after which he or she must run unopposed for retention. The sole question submitted to the electorate at that time is: "Shall Judge be retained in office?" A majority vote in favor of retention is required before a judge may serve a full term.

It is the last feature of the plan (which had been proposed in 1914 by the American Judicature Society) that is unique and distinguishes the plan from anything existing or likely to be proposed in Canada. The unopposed retention election almost always (about 99 percent of the time) results in confirmation of the judge,³³ but there are exceptions. The defeat of Chief Justice Rose Bird and other California Supreme Court judges in 1986 because the voters thought they were soft on crime was one such case.³⁴ No doubt the result of this high-profile election has had a chilling effect on other state judges coming up for a retention vote.³⁵ Another concern is that party politics may enter the process through the nominating commission.³⁶

Whatever the problems with merit selection plans, in the eyes of many observers they are better than straight partisan elections, now used for most judges in 12 states.³⁷ One major advantage of merit selection is that campaign funds do not normally have to be sought as they do in a regular election.³⁸ Studies have shown a disturbing relationship between campaign contributions and judicial outcomes.³⁹ A variation on the regular election is the nonpartisan election in which party affiliation is not mentioned, which is used to select most or all judges in 14 states and for judges in 5 states.⁴⁰

So this brief survey shows a wide variation in practices, with some states using combinations of methods. California, for example, uses a modified merit plan for the appellate bench and nonpartisan elections for superior and municipal courts.⁴¹ Although only a few states permit appointment by the governor without a nominating commission,⁴² the practice in many states results in the governor's being given the real power. In California, about 90 percent of the state's trial court judges are in fact appointed by the governor and not by nonpartisan elections because retirements apparently occur before the judge's term is out when the governor is of the same political party as the retiring judge. The appointed new judge, being an incumbent, is usually retained in office in a retention election.⁴³ Professors Stumpf and Culver conclude in their study *The Politics of State Courts* that "despite the existence of the

five separate selection systems for state judges [merit selection, appointment by the governor, appointment by the legislature, partisan elections, and nonpartisan elections] there appears to be little, if any, difference among them in terms of the judges who are recruited for the bench."⁴⁴ It does make a difference, however, who the governor is, as we saw in California.⁴⁵ Although it is at least interesting to understand the American state systems for selecting judges, it is not particularly helpful in determining what changes we should make in Canada. The existence of elections, whether partisan or nonpartisan, and the retention elections in the merit selection plans are not models that appear to have much if any support in Canada. Moreover, only three states (Massachusetts, New Hampshire, and New Jersey) have life, rather than more limited, terms.⁴⁶

6. CONCLUSION

The appointment process in Canada has greatly improved over the past few decades. At the provincial level, as we have seen, there have been significant developments in most provinces. In 1968, Ontario started the system of the review of proposed appointments by its new Judicial Council. British Columbia developed the system further by giving the Judicial Council the major role in selecting appointees. Quebec introduced the concept of competitions for specific positions. Ontario set up a separate, lay-dominated advisory body in 1988 to propose a ranked list of a very small number of names for specific openings. The Ontario system was placed on a statutory basis in 1994. Manitoba had adopted a similar system by legislation in 1989, whereby a committee provided an unranked list of at least three and not more than six names, thus giving the government a wider discretion than does the Ontario system in choosing who would fill the position. No doubt, other provinces are carefully considering these models for possible adoption.

There is much to be said in favour of all four provincial models mentioned above. My impression is that all are working reasonably well. They all give a nominating body considerable control over the selection of provincial court judges. All require that interviews be undertaken of at least a short list of candidates.

The federal system of appointments has also shown a marked improvement from the time the Canadian Bar Association's National Committee on the Judiciary started reviewing candidates for appointments in 1967. The 1988 process, described in detail in an earlier section, went further and set up review committees in each province. Further refinements were made in 1991 and 1994. Should further changes be made to the federal system? Let us look at a range of issues.

In the discussion that follows, it is not my intention to criticize past federal appointments. I have not made a specific study of the quality of appointments in Canada, and my personal impression, based on the judiciary that I know best, the

Ontario judiciary, is that the appointments have generally been very good ones. But one cannot predict what a future government will do, and, in any event, we want the quality of the judiciary to be as high as possible.

A. Elevations

In an earlier chapter examining the selection of chief justices, I stated: "If we are really concerned about judicial independence, how can we permit the government alone to choose a chief justice? There is a blatant conflict of interest for every judge who is interested in the position in trying to seem attractive to the government and thus be considered for the position."¹ The same can be said for elevations to appeal courts, including the Supreme Court of Canada, as well as for elevations from the provincial court to the superior courts. As a former English judge recently observed, "A judge who often found against the government, or in some other way displeased the executive, might find that promotion did not come his way."²

At the present time, promotions are strictly in the hands of the federal government. Normally, there is considerable consultation,³ but there is no necessity to consult. The provincial committees described in an earlier section are not involved in the selection.

From the beginning of the system in 1988, elevations of federally appointed judges were not included in the system and assessment of provincial court judges ceased in 1991.⁴ Kim Campbell, as minister of justice, expressed the view that year in relation to provincial court elevations that "the principle of judicial independence brings into question the appropriateness of committees reviewing such office holders and determining their qualification for a federal appointment."⁵ Allan Rock, the present minister of justice, has taken the same approach.⁶ The Canadian Bar Association, on the other hand, has recommended that "*all* elevations, including provincial court judges to superior courts, should be subject to review by the judicial appointment committees."⁷

There are concerns about judicial independence whatever system is chosen, that is, whether elevations are reviewed or not reviewed by the committees. In my opinion, however, the greater concern is when the decision is made by the government without an assessment by an outside group. Allowing government unlimited control of elevations poses more dangers to judicial independence than having others examine the merits of an elevation. The existing committee structure may not, however, be the appropriate one to consider elevations.

There should, in my view, be different committees for appointments to different levels of the judiciary. The present provincial committees may well be appropriate for appointments to the trial division, but not for elevations or appointments to the Supreme Court of Canada or the courts of appeal.

B. Supreme Court of Canada

Let us deal first with the Supreme Court of Canada. As discussed in a previous section, we have to find a compromise between the competing visions of the Supreme Court of Canada, that is, a compromise between provincial concerns about allocation of powers and the public's concern about the Court as a law-making institution under the Charter. The Meech Lake Accord, it will be recalled, would have restricted the federal government to appointments to the Supreme Court from nominations by the province or provinces concerned with the particular appointments.⁸ A similar approach was taken in the Charlottetown Accord of 1992.⁹ As we know, the Charlottetown Accord was rejected in a referendum.

Each reader will have his or her own preferred system.¹⁰ My own would provide for a nine-person committee to recommend a ranked list of a very small number of names, perhaps two or three. The committee, whose composition would be publicly known, could be made up of two nominees of the province or provinces particularly concerned with the appointment; three lawyers, each chosen by an institution such as the Federation of Law Societies, the Canadian Bar Association, and the Canadian Association of Law Teachers; and four representatives chosen by the federal government. I would not spell out in detail whether the representatives should be judges, lawyers, government officials, or lay persons. The federal government would choose its representatives after the others had done so and thus could help ensure a balanced committee. It would make sense to give the federal government even greater flexibility in shaping the committee by requiring that at least two or three nominees be put forward by each nominating group. I would assume that the deliberations of the committee and the short list would be confidential, although it is likely that rumours would circulate, as they now do, about what candidates were being considered. The committee would not include in its short list persons who, when contacted by the committee, have asked that their names not be included. I would not require applications, but would permit—indeed, prefer—that names from the bench and the bar be suggested by individuals, groups, or governments.

If the federal government did not choose one of the names on the short list, then some sort of confirmation hearing should be held. (The government should, however, have the right to ask the committee to consider further names.) This system would therefore give the government the right to go outside the list, but would put considerable pressure on it not to do so, as the government would have to justify its selection to the public and the confirmation body. Having substantial input by various interests before a name is put forward is preferable, in my view, to an after-the-fact investigation. The scheme suggested here would tend to avoid confirmation hearings, which many Canadian commentators find distasteful.¹¹

If such a process were to be introduced, careful thought would have to be given to the appropriate body that would hold a hearing, whether the candidate would be expected to appear, and whether it would be in public. In my view, a joint committee of the

House and the Senate would seem to be an appropriate body. Further, I think the candidate would be expected to appear. After all, the candidate would be one who had not been recommended by the committee. As in the U.S. Senate confirmation process, candidates could, and indeed should, refuse to answer questions on how they would decide specific issues. I would restrict questioning to members of the committee and counsel to the committee. As in the new U.S. Senate procedures, I would permit non-public hearings when personal matters were being discussed.

C. Elevations to the Court of Appeal

Some external committee should also nominate judges for specific openings in provincial courts of appeal. The difficulty is that trial judges do not now formally apply for an elevation, and it would be both impractical and inappropriate for the existing committees to survey *all* the trial judges. Moreover, many would say that it is not desirable to have trial judges formally apply for an elevation. I assume that a great many trial judges—how many is, of course, not known—would gladly accept an appointment to an appeal court, even though they would not wish to so declare themselves to an existing provincial committee. In my view, it is better for an outside body, perhaps similar to but not identical with the existing provincial committees, to examine all trial judges who by their reputation, expertise, sound judgment, and written reasons are thought to be likely candidates for a position. The committees would recommend a ranked short list of names to the government. If the government went outside the list, the fact, but not the names, should be publicly known, perhaps through an annual report of the Commissioner for Federal Judicial Affairs. A seven-person committee for specific appointments could consist of, say, nominees of the chief justice of the province and the chief justice of the trial division, nominees of the Law Society and the Canadian Bar Association, a nominee of the provincial Attorney General, and two nominees of the federal government. The committee would, of course, be able to recommend persons from the bar as well as the trial bench. Members of the bar would first have to have been recommended for the court of appeal by the regular provincial committee.

D. Elevations from the Provincial Courts

Another difficult issue involves the elevation of provincial court judges. In my opinion, it would be desirable for the appointing system to view the provincial bench as a good pool of talent that can be drawn on for the superior courts. (It would be highly exceptional for a provincial court judge to be elevated directly to the Court of Appeal. We are concerned here with elevations to the superior court trial division.) A large number of provincial court judges now apply to become federally appointed judges.

In the original 1988 scheme, as discussed earlier, these applications were examined by the provincial committees. This was changed in 1991. I would think—but this is just a guess—that the majority of provincial court judges would welcome an invitation to

join the superior courts, with their higher pay and status. Would it not be better to assume that all provincial judges have an interest in an elevation and to find ways of bringing some forward for serious consideration for elevation? Perhaps c.v.'s of *all* provincial court judges should be on file with the Commissioner of Federal Judicial Affairs, and some means found for narrowing the list to persons thought to be reasonable prospects for appointment. Those persons recommended to go forward for consideration would then be invited to submit an application in the normal way to the provincial committee. The application would include any evaluations of the judge that had taken place. There is generally so little information available on provincial court judges that, as discussed in an earlier chapter, it should, in my view, be standard practice to obtain some form of evaluation before an elevation of a provincial court judge is considered.¹²

Who would be on such a vetting committee? I would suggest a five-person committee, which would periodically review the files of all provincial court judges (perhaps with the exception of those who say that they prefer not to submit a c.v.). The committee could consist of a nominee of the chief justice of the trial division of the province, a nominee of the Law Society, a nominee of the provincial Attorney General, and two nominees of the federal government. Because of potential conflicts of interest and to encourage frank discussion in the committee, I would not include a provincial court judge, although the chief judge and others would, of course, be consulted. There would therefore be special vetting committees for each jurisdiction. This would be acceptable in the larger provinces, but perhaps in the others, regional vetting committees would be preferable.

E. Provincial Committees

The key issue is whether the provincial committees reviewing superior court applications should play a greater role in narrowing the range of candidates from whom the government can choose. At the present time, as we have seen, the committees rate the applicants as "highly recommended," "recommended", or "not recommended". The present minister of justice, Allan Rock, has undertaken to limit his selection to persons who are at least recommended. But the Minister still has a very wide discretion to choose candidates because there are many hundreds of persons who have been recommended. The approval rate for applicants for the years 1989-93 was 42 percent, and for 1994 it was 46 percent.¹³ Since the process commenced in 1989, there have been 3,157 applications nationwide (including provincial court applications) and 336 appointments have been made.¹⁴ In 1992, for example, throughout Canada, 206 applicants (out of 485 applicants) were recommended. In 1993, 109 out of 387 were at least recommended. There were only 57 recommended in 1994 out of 441 applications, but 1994 was unique in that the terms of appointment of the committees expired and the new government's committees operated for only a fraction of the year. Thus, over a three-year period during which the files are deemed to be valid, there might be over 400 names from which the government may choose, with only about 40 or 50 appointments to be made each year.

In my opinion, the present system gives the Minister too much discretion to bring in non-relevant political considerations. The system may not necessarily produce the *very best* candidates. It would be acceptable if the Minister chose appointees only from the list of those highly recommended, but the percentage of those highly recommended varies considerably across the country. In Ontario, there is a fairly large number in that category, whereas in British Columbia there are relatively few. Slightly fewer than one third of the 40 to 50 candidates selected in each of the years 1992, 1993, and 1994 were from the highly recommended category.¹⁵ About 40 percent of the applicants each year receive the designation "recommended" or "highly recommended", but only about 5 percent of the applicants are in the highly recommended category and this varies considerably from province to province. Would it not be better to choose a system like Manitoba's in which at least three and not more than six names are put forward for a particular opening? This would tend to narrow the list to the better candidates, but would still give the Minister a fair degree of flexibility in making appointments. Such a scheme would be difficult to operate with three uncoordinated committees in Ontario, without position specific competitions. Assuming the three committees were kept, they would have to have some mechanism for comparing candidates. They now sometimes meet to discuss criteria, but not candidates.

The new guidelines encourage, but do not require, interviews. Interviews may not be necessary for elevations from the trial division to the court of appeal, where the appointees are usually well known by their reputations and written judgments. Surely they should be required for all appointments to the trial division. Appointments are virtually for life. We do not have probationary appointments in Canada. Many of the candidates are not known to the majority of the committee members. In what other sphere do we make such important decisions without having had at least an opportunity for some of those making the decision to meet with the person to be selected?¹⁶ England has now instituted an interview system for all persons below High Court judges. The exemption of High Court judges is understandable given that there are only about 100 High Court judges and that the selection is from among leading barristers who are well known both as barristers and, as we will see below, as part-time judges. Interviews are also conducted by the American Bar Association Committee for federal appointments.

England has also started introducing competitions for specific openings. Quebec has had competitions for many years. I have already suggested that they be held for court of appeal and Supreme Court appointments. In my opinion, they should also be tried for trial court openings. As in Ontario and England, the positions should be advertised. Because of the turnover in some centres, such as Metropolitan Toronto, such a scheme may be difficult to work, but it would not face that difficulty in most parts of Canada.

The Ontario appointment system could be looked at by the federal government in other respects. Ontario, as has England, has developed very detailed lists of selection criteria.¹⁷ More extensive criteria than now exist should also be developed and made

available at the federal level. Further, Ontario has started producing a detailed Annual Report, the first of which appeared in early 1994.¹⁸ Again, such a report would be desirable at the federal level.

F. Part-time Appointments

This final subsection raises an issue which requires further careful consideration in Canada, that is, part-time appointments to trial courts. As we saw, part-time appointments are an integral part of the English system of appointing judges. One simply cannot become a full-time judge in England without sitting for a reasonable time as a part-time judge. This allows the part-time judge to assess whether he or she wishes to become a judge and gives others a chance to assess whether the person would make a good full-time judge. Further, it provides a relatively inexpensive way of keeping judicial business moving. The question is why Canada does not experiment with the system, found so important in England.

There are, of course, possible constitutional problems at the federal level.¹⁹ But are we certain the Supreme Court of Canada would strike down a carefully constructed federal system that has great potential merit? The appointment could, for example, be for a limited, non-renewable period of, say, five years. Further, the system could require that politically sensitive matters not be given by the chief justices or chief judge to part-time judges.

There are fewer problems at the provincial level. The *Lippé* case, as we saw in chapter 1, upheld part time appointments in Quebec.²⁰ The federal government could develop an experimental scheme in conjunction with a province whereby individuals could work part time for up to, say, 60 days a year hearing criminal cases in the provincial court. Provincial legislation could constitutionally be enacted increasing the jurisdiction of the small claims courts well beyond the present limits for certain part-time judges. This increase would be necessary because it is unlikely that a large number of potential federal appointees would be eager to work in the present small claims court, whereas they probably would be interested in doing so in a court with more substantial civil jurisdiction. The part-time judges would be potential candidates for appointment to both the provincial and the superior court benches. Because the federal government would gain some benefit from the scheme it would be reasonable for it to contribute to the cost. In my opinion, the English system of part-time appointments is worth very careful consideration.

CHAPTER TWELVE: CONCLUSION

This study has covered a wide array of topics related to judicial independence and accountability. In this final chapter, a brief summary of the conclusions to the preceding chapters will be given.

In the introductory chapter, the importance of judicial independence is stressed. A Canadian senator stated it well in 1894: “The safety and happiness and peace of a community depend largely on the confidence that people have in the judiciary. People should feel that their rights are safe under the law, and that the judiciary give wise and impartial judgments.”¹ Impartial judgments may not necessarily be given, however, if judges can, for example, be arbitrarily dismissed or financially punished as a result of decisions that do not find favour with the government. The independence of the judiciary is obviously important to society. Accountability is also important. Society has a strong interest in a judiciary that acts wisely, properly, and efficiently—as well as impartially. The judiciary should seek to develop techniques of accountability that are consistent with judicial independence. This study suggests a number of ways of doing so. Accountability can, in fact, enhance the public’s respect for independence. If the judiciary does not meet the challenge, there is a danger that cruder, less sensitive solutions may be imposed on them.

The chapter examines the long history of the struggle for judicial independence over the centuries, and actions by the international community over the past few decades to develop minimum standards. Supreme Court of Canada decisions on the judicial independence aspects of the Constitution, particularly under section 11(d) of the Charter relating to a hearing “by an independent and impartial tribunal”, are analysed and the conclusion drawn that the Supreme Court has shown a reasonable, pragmatic, and restrained approach to the issues. At the end of the chapter, the question is raised whether further constitutional protections are required. The view is expressed that it would be desirable to include the Supreme Court of Canada more firmly in the Constitution, but would be better to leave things as they are with respect to a general statement on judicial independence.

Chapter 2 examines various ways we protect the judiciary from harm and interference. Fortunately, protection from physical harm has not had to be a significant concern in Canada in the past, but it is potentially a serious one, and scenarios in which the safety of judges in Canada is seriously threatened are not difficult to imagine. There have, however, been some incidents involving political interference in Canada, which are discussed in the chapter along with the policies developed to help prevent their future occurrence. Judges are also protected by the law of contempt from unwarranted interference with the judicial process. The former law prohibiting scandalous attacks on a judge or the judiciary has, however, been severely cut back by recent decisions. The issue of immunity for civil and criminal liability is then explored. The present law

properly provides that judges are in general given absolute civil immunity for bona fide judicial activity. Judges should also be protected from criminal prosecutions for bona fide conduct related to their judicial duties. But there should be no civil or criminal immunity for acts unconnected with the judicial function. The final section of the chapter looks at the question of removing jurisdiction from the judiciary to other tribunals. It is noted that the Supreme Court of Canada has recently been developing policies that do not unduly prevent the setting up of provincial tribunals, yet provide that decisions of these tribunals are subject to judicial review by the superior courts.

Security of tenure is discussed in chapter 3. It is argued that age 70 is a desirable retirement age for judges and that a constitutional amendment should be passed applicable to future appointments for federally appointed judges. This was government policy during the constitutional discussions in the 1970s. England, it is noted, has recently introduced compulsory retirement at age 70. Most other jurisdictions also so provide. Such a provision would permit supernumerary status for only five years, that is, from age 65 to 70, which, it is argued, is a more reasonable period than the present ten years. It is also recommended that the Canadian Judicial Council develop minimum standards applicable to the work expected of supernumerary judges. The chapter ends with a discussion of what should be done with a judge who is incapacitated or disabled because of illness or infirmity. At present, such a judge is dealt with through the discipline process, with incapacity through disability being treated as a lack of "good behaviour". It would be better, it is argued, to treat such a case in the same way it is dealt with in other parts of society, that is, through long-term disability status. We should not assume today that incapacity because of disability is necessarily permanent. The determination of incapacity should be made by the judiciary, and a further replacement appointment authorized after such a determination. This is now the practice in the U.S. federal system. If the incapacitated judge recovers, he or she would return to the bench.

Chapter 4 discusses the sensitive issue of financial security. It is in society's interest to provide fairly generous pay and pensions so that judges are not unduly worried about their present or future financial state. Financial security is also important as a means of attracting a pool of the best candidates for appointment to the bench. Reducing salaries as part of an overall government measure is explored and the opinion ventured that doing so is probably not unconstitutional, although the wisdom of doing so is another matter.

The present Triennial Commission method of establishing judicial remuneration for federally appointed judges is questioned. Should remuneration be established for judges separately, or as part of the review of other senior salaries paid from government funds, as is now done in England, the United States, and Australia? It is suggested that consideration be given to replacing the present Triennial Commission system with something less masochistic. In any event, there should be some technique for ensuring that a commission's recommendations be considered by Parliament.

Binding arbitration is not favoured by this writer. Some form of negative or positive resolution procedure would be better, although there is uncertainty about the constitutional validity of such schemes. Perhaps the best approach is to provide by legislation that the government must respond to the commission's report by introducing its own legislation within a set time period, although without necessarily adopting the commission's recommendations. A negative or positive resolution procedure based on a government Bill may not be as vulnerable to constitutional challenge as one that is based simply on a commission report.

Pensions are dealt with in some detail in the chapter on financial security and a number of changes suggested. Good pensions are important as a way of ensuring that judges are not unduly concerned about their future security and thus can act completely independently, according to their consciences and not their future prospects. Some provincial plans, however, do not provide the public with this feeling of assurance. One consideration that seems important to this writer is not to provide a pension system that *encourages* good judges to retire at too early an age and seek a third career. The present system allows for retirement at age 65 after 15 years on the bench. It seems acceptable, however, to permit earlier retirement, at, say, age 60, as England has recently permitted, with an actuarially reduced pension. This would probably not *encourage* retirements, nor would permitting retirement before 60 with something somewhat better than the present arrangement of the judge's contribution plus four percent interest. We do not want discontented judges to stay because of the eventual pension. Very long serving judges should, it is argued, have the right to retire with a full pension or become supernumerary at any age before 65. How should one define long service? I would say that it should be about 22 years, although some argue for a shorter period. This would be in addition to the present right to retire at age 65 after 15 years' service.

Many provincial pension plans require too long a period of service before a reasonable pension is paid. A 20-year accrual period would be a reasonable standard for provincial plans. The federal government should also consider instituting a 20-year accrual period for future appointments for a full pension. Service for a lesser period would mean less than a full pension. Legislation to this effect was recently enacted in England. A judge should be able to satisfy the 20-year period through a combination of regular and supernumerary service. Would these suggested changes harm future recruitment? I think that they would not. Although a 20-year accrual period is obviously less desirable for a judge than a 15-year period, the other suggested changes, such as providing for the possibility of retirement at age 60, would be seen as a distinct advantage, and allowing time served as a supernumerary judge to be included in the 20-year period would mean that a person appointed at age 50 would be able to receive a full pension at age 70.

Chapter 5, the lengthy chapter on discipline, explores existing disciplinary procedures in Canada and elsewhere in considerable detail. There is a natural tension between accountability and independence. The public needs to be assured that complaints of misconduct are properly dealt with. At the same time, accountability could have an inhibiting effect on proper judicial action. It is necessary to devise systems that provide for accountability, yet at the same time do not curtail a judge's obligation to rule honestly and according to the law. A well-thought-out, balanced system should enhance accountability and, at the same time, increase the public's confidence in the judiciary and therefore encourage respect for judicial independence.

A number of suggested changes should be considered. Some thought should be given in advance to the procedures that should be followed if a joint address procedure by Parliament is undertaken against a federally appointed judge. Something more than a bare majority of each House should be required. And at the provincial level, something more than a Cabinet decision should be necessary.

Investigations are now first undertaken by the Canadian Judicial Council for federally appointed judges and by provincial judicial councils for provincially appointed judges. If we were designing the system from scratch, it would make sense to have greater integration of the discipline systems for both federally and provincially appointed judges. After all, we have one integrated legal system. The concept is not further developed in the chapter. It is something that should, however, be explored in the future.

One suggested change in the practice of the Canadian Judicial Council is to give the chief justice of the court of the judge against whom a complaint has been made the opportunity to deal with the complaint first if the chief justice wishes to do so. The complainant should, however, have the right to take the matter further, to the Canadian Judicial Council. In the U.S. federal system, complaints first go to the chief judge of the circuit. There is virtual unanimity in the U.S. federal courts that the system works well in giving the chief judge a reason to discuss and perhaps resolve potential problems the judge may be experiencing. Undesirable conduct is therefore dealt with at an early stage without making a "federal" case out of the issue. This is the way undesirable conduct is dealt with in most other institutions. Except in extreme cases, the object of the discipline process should be to change behaviour, not to degrade or consider removal of the judge.

If the matter goes on to the Canadian Judicial Council, then it should be dealt with in the normal manner by the Judicial Conduct Committee. I have examined a large number of files for the past few years, and it is my clear impression that the Executive Director and the Committee deal with the complaints very conscientiously. The present procedure of having the chair or one of the vice-chairs first deal with the complaint, with the possibility of sending it on to a panel of chief justices from the Judicial Conduct Committee for further consideration and from there to a formal Inquiry, works

well. Those involved in one stage of a specific complaint are not involved in any other stage. Having the members serve sometimes as investigators and sometimes as adjudicators is better, in my opinion, than having separate bodies handle each function, as is the practice in many of the American state systems.

A number of changes are suggested to make the system more visible. A formal Inquiry should normally be public, and there should be both a lay person and a lawyer on the Inquiry. Further, there should be a puisne judge on the panel and not just chief justices. This earlier panel stage, which recommends to the full Council whether a formal Inquiry should be held, should not be public, but should include a non-judge as a member of the panel. How can we ensure that the screening stage is operating properly? It is at that stage that 95 percent of the complaints are dismissed. I suggest that there be public disclosure in a sanitized form of all complaints dealt with, plus a periodic external review of all the decisions made in the complaints process.

There are other matters discussed in the discipline chapter. It is suggested that only the Minister of Justice and not the attorney general of a province have the right to demand rather than request a formal Inquiry. Further, it is suggested that the right to publicly or privately reprimand a judge be specifically given to the Canadian Judicial Council. In my opinion, from my analysis of the origins of the Council, they already have the power to do so, as I do not view the Council as having the right only to recommend removal or to do nothing. But this is not the view held by many members of the Council, so clarification is desirable. Moreover, steps should be taken to increase the public's awareness of the complaint procedure.

A code of conduct is strongly recommended for the judiciary in chapter 6. The Canadian Judicial Council should take the lead in drafting a code, working closely with the provincial chief judges, federally and provincially appointed puisne judges, and lawyers' organizations. It is very important to try to produce a code that is adopted by provincially appointed judges as well as federally appointed ones. It would be a mistake to end up with different standards for different courts. This study does not enter into the question of what should be contained in a code. That should be left to the drafters. In my view, however, the U.S. federal code would be a good starting point. The U.S. code is used primarily for guidance and is not as directly tied to discipline as are most of the state codes. The federal code's use of comprehensive advisory opinions is also very helpful, as are its confidential opinions on specific issues. Thought should also be given to the question whether a limited form of non-public financial disclosure by judges would be desirable, as now used in the U.S. federal system and in other areas of public life.

Chapter 7 looks at the sensitive question of performance evaluation of judges. Some form of periodic evaluation of how judges conduct proceedings would, in my view, enhance the effectiveness of the judiciary. Evaluations would be most useful if they were designed and administered by the judiciary. They might, for example, take place

every few years and could survey a sample of lawyers who appeared before the judge, as well as others. It is suggested that, at least in the short run, the evaluation should go only to the individual judge evaluated, who would have an obligation to discuss the result's with someone else, perhaps selected by the judge from a defined group of respected judges or former judges. Other forms of feedback, such as reviewing videotaped proceedings and Bench/Bar Committees that pass on concerns expressed by the Bar, are also explored.

Judicial education, which has been taken seriously by the judiciary in Canada, is described in chapter 8. The National Judicial Institute, established in 1988, and other organizations, have been actively developing programmes on substantive issues and skills training, as well as on gender, racial, and other social awareness issues. The National Judicial Institute has set a standard of approximately ten days per calendar year for attending judicial education programmes. The problem in achieving this desirable and very modest objective, however, will be lack of funds.

Techniques for administering the court system are analysed in detail in chapter 9. A survey is made of the present practices in Canada, both for federally established courts and for courts in the provinces, as well as practices in England, the United States, and Australia. At present, the courts in all provinces are administered by attorney general's departments. The many past and present proposals for change in Canada are examined. These include the Deschênes Report, various proposals in Ontario over the past twenty-five years, and recent unsuccessful legislative efforts in Quebec. Other Canadian institutions, such as the Auditor General, are also explored as possible models.

A number of conclusions are drawn from the survey and analysis. There is a need for some separation or buffer between the judiciary and the attorney general, the chief litigator before the courts. Moreover, it is desirable to give the judiciary greater control over their working conditions on the theory that people work more effectively if they have control over their work environment. It makes sense to have the three levels of courts working together. There are ways of sharing resources and streamlining the process if there is a cooperative effort amongst the courts. Nevertheless, to the extent possible, decentralization of the administrative decisions that affect the members of each court is also desirable. Further, the administrator of the courts should not have to report to two masters, the attorney general and the judiciary.

A number of models are explored, such as the cooperative model found in some provinces and the recent memorandum of understanding between the Province of Ontario and the provincial division of the Ontario Court of Justice. This writer favours a Board of Judicial Management encompassing all three levels of the judiciary. The Board could consist of judges and various non-judicial appointees in approximately equal numbers. The 12- or 13-member Board would appoint the administrator of the courts, would allocate the budget amongst the three levels of courts, would attempt to streamline and coordinate the work of the courts, and would prepare the estimates that

would be channelled through the attorney general's department. Memoranda of understanding could be entered into between a court and the Board. The system would not turn judges into administrators. Administration would be done by the administrator. It would, however, give the judiciary a greater stake in running the court system and incentives for running the courts efficiently.

The role of the chief justice is then examined. The present model of a lifetime appointment with potentially autocratic power may not produce as good a functioning court as one in which there is a more collegial approach. Two ways of helping to achieve collegiality are limited-term appointments for chief justices and the involvement of the court in the selection of the chief justice. It is suggested that a seven-year term may be the most appropriate term. Further, a search committee involving some members of the court, the bar, and the government should recommend a ranked short list of names to the government. The government could go outside the list, but this fact would be publicly known and a government would therefore be reluctant to do so.

Finally, we come to appointments. While important developments have taken place in Canada over the past several decades, further improvements should be considered. It is recommended that provinces that have not changed their appointment policy should look carefully at the nominating systems in Ontario, British Columbia, Quebec, and Manitoba, all of which appear to be working well.

At the federal level, it is suggested that special nominating committees be established for each appointment to the Supreme Court of Canada. The committee could consist of nominees of the provinces from which the appointment will be made, nominees of legal groups, and nominees of the federal government. The committee would present a short ranked list of names to the government. If the government went outside the list, a public confirmation hearing (with the exception of personal matters) would be held by, perhaps, a joint House and Senate Committee. Similarly, specific committees should be established for court of appeal openings. The fact that a selection was made outside the list would be made known, but no confirmation hearing would be required. No applications would be expected from trial judges. Lawyers who had indicated in their applications an interest in a court of appeal appointment and who had passed through the regular provincial review process for such an appointment would also be considered. As to elevations of provincial court judges to the superior court trial division, it is recommended that full resumes of all provincial court judges be kept on file with the Commissioner for Federal Judicial Affairs and that a small special committee bring to the attention of the regular provincial committees the names of provincial court judges who should be considered by the provincial committee.

The existing provincial judicial appointment committees, in my view, give the government too much discretion in the appointment process. There is a very large number of names of "recommended" candidates from which the government can

choose. Would it not be better to adopt a system such as that in Manitoba, where, say, three to six names are put forward for a specific opening? Further, should not some members of the committee, if not the whole committee, interview the candidates for such an important, virtually life-long position?

The appointments chapter ends with a discussion of part-time appointments, which are now almost invariably required in England before appointment to the bench. Such a procedure, which allows a potential appointee to discover whether he or she likes being a judge and gives others the opportunity of seeing whether the potential appointee would be a good judge, is worth careful consideration. It is likely that a well-thought-out system would be held to be constitutional by the Supreme Court of Canada.

This study has analysed a great number of issues relating to the independence and accountability of the judiciary. The judiciary, as the title to this volume suggests, is properly “a place apart.”² That place has a solid historical foundation and a fine edifice. This study suggests some relatively modest renovations in its structure to keep it a strong, respected, and independent institution.

ENDNOTES

PREFACE

1. *Senate Debates*, 24 May 1932, at p. 457.
2. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
3. Canadian Judicial Council, June, 1993.

CHAPTER ONE: INTRODUCTION

Chapter 1

1. INDEPENDENCE AND IMPARTIALITY

1. Senator Henry A. N. Kaulbach, Hansard, *Senate Debates*, 12 July 1894, at p. 702.
2. John Locke, *The Second Treatise on Government* (T. P. Peardon, ed.) (New York: Macmillan, 1985) at pp. 9-10, and 51. See Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 20-1.
3. Speech at the Annual Meeting of the C.B.A. in Toronto, 20 August 1994, at p. 4.
4. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481 at 493, [1986] 2 S.C.R. 56.
5. *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at p. 168.
6. *The Judiciary in Canada*, at p. 21.
7. R. McGregor Dawson, *The Government of Canada*. (U. of Toronto Press, 1954) at p. 486.
8. W. R. Lederman, "The Independence of the Judiciary" in *The Canadian Judiciary* (A. M. Linden, ed.) (Toronto: Osgoode Hall Law School, 1976) at p. 11.
9. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
10. See, e.g., *Dagenais v. C.B.C.* (1994) 94 C.C.C. (3d) 289, [1994] 3 S.C.R. 835; *C.B.C. v. McConachie* (8 Dec. 1994), as yet unreported (S.C.C.).
11. See generally, P.C. Stenning, *Accountability for Criminal Justice: Selected Essays* (U. of Toronto Press, 1995), especially chapter 15 by Ian Greene, "Judicial Accountability in Canada".

Chapter 1

2. BRIEF HISTORY OF JUDICIAL INDEPENDENCE

1. See p. 779 of the first of W. R. Lederman's two classic articles on "The Independence of the Judiciary" in (1956) 34 *Can. B. Rev.* 769 and 1139, both of which have been heavily relied on throughout this section. Lederman notes that the Barons of the Exchequer were exceptions and served during good behaviour.
2. Francis Bacon, "Essays: of Judicature" in *A Selection of His Works* (S. Warhaft, ed.) (Toronto: Macmillan, 1965) at pp. 187-8. See generally, S. Shetreet's important study, *Judges on Trial* (Amsterdam: North-Holland Publishing, 1976) at p. 6; T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworths, 1956) at pp. 242-5; F. M. Greenwood, *Legacies of Fear* (U. of Toronto Press, 1993) at p. 27 and throughout; C. D. Bowen, *The Lion and the Throne* (Boston: Little, Brown, 1957).
3. J. H. Baker, *Introduction to Legal History*, 3rd ed. (London: Butterworths, 1990) at pp. 125-6; see also Greenwood, at p. 28; Plucknett, at pp. 242-5.
4. 1701, 12 & 13 William III, c. 2.
5. Lederman, at p. 782.
6. 1689, 1 William III and Mary II, sess. 2, c. 2.
7. Lederman, at p. 782.
8. 1701, 12 & 13 William III, c. 2, s. III. See Lederman, at p. 782. Shetreet points out at p. 10, note 47, that it was originally resolved that judges should be removed on the address of either House, but it was later amended to both Houses.
9. Robert Stevens, *The Independence of the Judiciary* (Oxford: Clarendon Press, 1993) at p. 3.
10. See D. Lemmings, "The Independence of the Judiciary in Eighteenth Century England" in Peter Birks, *The Life of the Law* (London: The Hambleton Press, 1993) at p. 126.
11. 1 George III, c. 23; see Shetreet, at pp. 10-11.
12. Lemmings, at p. 127.
13. See W. Prest, "Judicial Corruption in Early Modern England" (1991) 133 *Past and Present* 67 at p. 92.
14. Prest, at p. 75.
15. Prest, at p. 71.
16. Prest, at p. 73.
17. Prest, at pp. 77 and 83.
18. Plucknett, at pp. 60-4.

19. 1701, 12 & 13 William III, c. 2.
20. Plucknett, at pp. 60-1.
21. Shetreet, at pp. 14-15; Greenwood, at pp. 30-31. The Law Lords, of course, continue to sit in the House of Lords.
22. Senator Sam Ervin, "Separation of Powers: Judicial Independence" (1970) 35 *Law and Contemporary Problems* 108; M. J. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967).
23. C. de S. Montesquieu, *Spirit of the Laws*, vol. 1 (T. Nugent, trans. and ed.) (New York: Colonial Press) at pp. 151-2.
24. Lederman, at pp. 1142-3. See also Russell Osgood, "Judicial Independence", a paper delivered at the Cornell Lectures, July, 1994, forthcoming *U. of Toronto L.J.*, at p. 6: "there was no consensus in the period leading up to 1776 that good behaviour tenure, secured to English judges by the Act of Settlement, extended to colonial judges."
25. Lederman, at p. 1144.
26. *The Federal and State Constitutions*, Vol. III (F. N. Thorpe, ed.) (Washington: Government Printing Office, 1909) article 29 at p. 1893. See also Ervin, at p. 113. See generally, Russell Osgood, "Judicial Independence".
27. Number 47. See Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (N.Y.: New American Library, 1961; orig. pub. 1788) at p. 301. See also Ervin, at pp. 114-7.
28. *Report of the National Commission on Judicial Discipline and Removal* (Washington, 1993) at p. 164.
29. Lederman, at p. 1140.
30. Lederman, at pp. 1146-7.
31. Lederman, at pp. 1148-9.
32. Greenwood, at p. 29.
33. Lederman, at p. 1149.
34. Greenwood, at p. 34.
35. (U. of Toronto Press, 1993).
36. At pp. 4, 27 and 256 *et seq.*
37. Greenwood, at pp. 167 and 257 *et seq.*
38. At p. 259.

39. See generally, P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (U. of Toronto, 1984).
40. An Act to render the Judges of the Court of King's Bench in this Province Independent of the Crown, Stat. of Upper Canada 1834, 4 Wm. IV, c. 2. See also Lederman, at p. 1150.
41. Stat. Can. 1843, 7 Vict., c. 15; see also c. 65. See generally, J.-Y. Morin, "L'Evolution Constitutionnelle du Canada et du Québec de 1534 à 1867" in J.-Y. Morin and J. Woehrling, *Les Constitutions du Canada et du Québec* (Montreal, Les Éditions Thémis, 1992) at pp. 84-88.
42. Earl of Durham, *The Durham Report* (Oxford: Clarendon Press, 1945) at p. 177. See Lederman at p. 1151.
43. Lederman, at p. 1150.

Chapter 1

3. THE BRITISH NORTH AMERICA ACT

1. Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), set out in R.S.C. 1985, App. II.
2. See, e.g., G. P. Browne, *Documents on the Confederation of British North America* (Toronto: McLelland and Stewart, 1969) at pp. 45-47 (the Charlottetown Conference, 1864).
3. See, e.g., Hansard, *House of Commons*, 4 March 1867, at p. 1319.
4. Browne, at p. 87.
5. British North America Act, 1867, 30 & 31 Victoria, c. 3 (U.K.).
6. See the drafts set out in Browne: at p. 223 (London Conference, 1866); and pp. 230 *et seq.* (later drafts). And see the Canadian Parliamentary Debates of 3 February 1865.
7. S. 99(2) as enacted by the British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.).
8. *Beauregard v. Can.* (1986) 30 D.L.R. (4th) 481 at 493, [1986] 2 S.C.R. 56.
9. *Toronto v. York* [1938] A.C. 415 at p. 426, cited by Dickson C.J.C. in *Beauregard v. Can.* (1986) 30 D.L.R. (4th) 481 at 493-4, [1986] 2 S.C.R. 56.

Chapter 1

4. CHARTER AND OTHER CONSTITUTIONAL CASES

1. See *Wigglesworth* (1987) 37 C.C.C. (3d) 385, [1987] 2 S.C.R. 541; *Shubley* (1990) 52 C.C.C. (3d) 481, [1990] 1 S.C.R. 3.
2. *Généreux* (1992) 70 C.C.C. (3d) 1 at 38, [1992] 1 S.C.R. 259.
3. Stat. Can. 1960, c. 44, set out in R.S.C. 1985, App. III.

4. Ian Brownlie, ed., *Basic Documents on Human Rights*, 3rd ed. (Oxford: Clarendon Press, 1992) at p. 23.
5. W. S. Tarnopolsky, *The Canadian Bill of Rights*, 2nd revised ed. (Toronto: McLelland and Stewart, 1975) at p. 264.
6. *Canada v. MacKay* (1980) 54 C.C.C. (2d) 129, [1980] 2 S.C.R. 370.
7. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
8. *Ibid.*, at p. 204 C.C.C.
9. See *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716, [1978] 1 S.C.R. 369.
10. *Valente* No. 2 (1983) 2 C.C.C. (3d) 417, 145 D.L.R. (3d) 452 (Ont. C.A.). See also *Reference Re Justice of the Peace Act, sub nom. Currie* (1984) 16 C.C.C. (3d) 193, 48 O.R. (2d) 609 (Ont. C.A.), upholding the independence of justices of the peace in Ontario.
11. *Valente* (S.C.C.), at p. 201 C.C.C.
12. *Ibid.*, at p. 199 C.C.C.
13. *Ibid.*, at p. 201 C.C.C.
14. *Ibid.*, at pp. 201-2 C.C.C.
15. See Ian Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26 *Osgoode Hall L. J.* 177 at p. 194: "A lack of independence could be considered a good indication of a lack of impartiality."
16. *Lippé* (1990) 64 C.C.C. (3d) 513 at 530, [1991] 2 S.C.R. 114.
17. R. K. Osgood, "Judicial Independence" at p. 3, paper presented on 3 August 1994 at the Cornell Lectures, forthcoming *U. of T. L.J.*
18. *Valente*, at p. 208 C.C.C.
19. *Ibid.*, at pp. 208, 216, and 219 C.C.C.
20. See Lamer C.J.C. in *Généreux* (1992) 70 C.C.C. (3d) 1 at p. 20, [1992] 1 S.C.R. 259. See also Osgood's description of Le Dain J.'s "flexible framework, within the larger context of a firm commitment to judicial independence."
21. *Valente*, at p. 207 C.C.C.
22. *Ibid.*, at p. 208 C.C.C.
23. *Ibid.*, at pp. 211-12 C.C.C.
24. Provincial Courts Amendment Act, 1983, c. 18.

25. *Valente*, at pp. 212-16 C.C.C.
26. *Ibid.*, at p. 216 C.C.C.
27. *Ibid.*, at p. 219 C.C.C.
28. *Ibid.*
29. *Ibid.*, at p. 222 C.C.C.
30. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481, [1986] 2 S.C.R. 56.
31. Peter Russell, "Case Comment on *MacKeigan v. Hickman*" (1990) 69 *Can. B. Rev.* 559 at p. 559.
32. *Beauregard*, at p. 496 C.C.C.
33. *Ibid.*, at p. 497 C.C.C.
34. *Ibid.*
35. *Ibid.*, at p. 500 C.C.C.
36. *Ibid.*, at p. 501 C.C.C.
37. *Ibid.*, at pp. 502 *et seq.* C.C.C.
38. *Ibid.*, at p. 507 C.C.C.
39. See chapter 4 of this Report.
40. *Beauregard*, at pp. 491 *et seq.* C.C.C.
41. *Ibid.*, at p. 494 C.C.C.; see also Greene, at pp. 189 and 200.
42. *Ibid.*, at p. 491 C.C.C.
43. *Ibid.*, at p. 492 C.C.C.
44. *MacKeigan v. Hickman* (1989) 50 C.C.C. (3d) 449, 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796.
45. R.S.N.S. 1967, c. 250, ss. 3 & 4.
46. *MacKeigan*, at p. 484 C.C.C.
47. At p. 484-6 C.C.C. Only La Forest J. held that the province had no such authority: see p. 459 C.C.C.; *cf.* Wilson J. at p. 457 C.C.C.
48. *MacKeigan*, at pp. 481-2 C.C.C.

49. La Forest J. suggests this at p. 460 C.C.C. See Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at p. 168, note 35: "the tenor of the judgments suggests that even an explicit statutory authority for the testimony would have been ineffective, because it would have been contrary to s. 99."
50. See *N.B. Broadcasting Co. v. N.S.* [1993] 1 S.C.R. 319 at p. 377.
51. *MacKeigan*, at p. 464 C.C.C. *per* Cory J.
52. *Ibid.*, at pp. 454-6, 456-9, 461-9 C.C.C.
53. *Ibid.*, at pp. 464-7 C.C.C. *per* Cory J.
54. *Ibid.*, at p. 466 C.C.C.
55. R.S.C. 1985, c. J-1, s. 63(4)(a).
56. Russell, at p. 568.
57. *Lippé* (1990) 64 C.C.C. (3d) 513, [1991] 2 S.C.R. 114.
58. *Braconnier* [1988] R.J.Q. 981 (Que. S.C.); *Tessier v. Pacquet* (1988) 48 C.R.R. 372 (Que. S.C.); see *Lippé* at p. 519 C.C.C.
59. *Lippé*, at p. 525 C.C.C.
60. *Ibid.*, at p. 525 C.C.C.
61. *Ibid.*, at p. 531 C.C.C.
62. *Ibid.*, at pp. 534-5 C.C.C.
63. *Ibid.*, at p. 539 C.C.C.
64. *Ibid.*, at p. 529 C.C.C.
65. *Ibid.*, at pp. 529-30 C.C.C.
66. See article 2.02 of the Universal Declaration on the Independence of Justice, First World Conference on the Independence of Justice, Montreal, June, 1983, set out in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate*. (Netherlands: Martinus Nijhoff, 1985) at p. 450 and as quoted by Gonthier J. in *Lippé* at p. 541 C.C.C.
67. See *C.P. Ltd. v. Matsqui Indian Band* [1995] 1 S.C.R. 3, applying *Valente* in a flexible manner to administrative tribunals via the rules of natural justice.
68. *Généreux* (1992) 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, [1992] 1 S.C.R. 259.
69. *Ibid.*, at p. 20 C.C.C.

70. *Canada v. MacKay* (1980) 54 C.C.C. (2d) 129, [1980] 2 S.C.R. 370.
71. *Ibid.*, at pp. 137-8 C.C.C.
72. *Généreux*, at p. 34 C.C.C.
73. *Ibid.*, at p. 35 C.C.C.
74. *Ibid.*, at p. 37 C.C.C.
75. *Ibid.*, at p. 41 C.C.C.
76. *Ibid.*, at p. 21 C.C.C.
77. *Ibid.*, at p. 34 C.C.C.
78. *Ibid.*, at p. 37 C.C.C.
79. *Ibid.*, at p. 35 C.C.C.
80. *Ibid.*, at p. 49 C.C.C.
81. *Valente*, at p. 212.
82. *Généreux*, at p. 52 C.C.C.
83. *Ibid.*, at p. 54 C.C.C.
84. *MacKay*, at pp. 133-144.
85. R. D. Lunau, "Military Tribunals under the Charter" (1992) 2 *N.J.C.L.* 197; Michael Doi, "The Judicial Independence of Canadian Forces General Court Martials" (1993) 16 *Dal. Law Journal* 234; C. F. Blair, "Military Efficiency and Military Justice: Peaceful Co-Existence?" (1993) 42 *U.N.B. Law J.* 237; and J. E. Lockyer, "Charter Implications for Military Justice" (1993) 42 *U.N.B. Law J.* 243.
86. *Bain* (1992) 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, [1992] 1 S.C.R. 91. The case was, in fact, released three weeks before *Généreux*, but it seems better to deal with it last.
87. S. 7 was raised, but not argued because s. 11(d) covered the same ground. The "fair hearing" part of s. 11(d) was not raised because it requires actual, rather than perceived, unfairness.
88. *Bain*, at p. 511 C.C.C.
89. *Ibid.*, at p. 511 C.C.C.
90. *Ibid.*, at p. 513 C.C.C.
91. *Ibid.*, at p. 491 C.C.C., citing *Lippé* at p. 534 C.C.C.
92. *Ibid.*, at p. 492 C.C.C.

93. *Ibid.*
94. *Ibid.*, at p. 505.
95. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
96. *Lippé* (1990) 64 C.C.C. (3d) 513, [1991] 2 S.C.R. 114.
97. *Généreux* (1992) 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, [1992] 1 S.C.R. 259.
98. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481, [1986] 2 S.C.R. 56.
99. *MacKeigan v. Hickman* (1989) 50 C.C.C. (3d) 449, 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796.
100. *Bain* (1992) 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, [1992] 1 S.C.R. 91.

Chapter 1

5. THE UNITED NATIONS AND OTHER ORGANIZATIONS

1. This document and several others referred to in this section are conveniently collected in Ian Brownlie, ed., *Basic Documents on Human Rights*, 3rd ed. (Oxford: Clarendon Press, 1992). See p. 21.
2. Stat. Can. 1960, c. 44, set out in R.S.C. 1985, Appendix III, s. 2(f).
3. Brownlie, at p. 326.
4. See S. Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Netherlands: Martinus Nijhoff, 1993).
5. Brownlie, at p. 326.
6. See generally, the *European Human Rights Reports*; A. H. Robertson and J. G. Merrills, eds., *Human Rights in Europe*, 3rd ed. (Manchester U. Press, 1993); C. A. Gearty, "The European Court of Human Rights and the Protection of Civil Liberties: An Overview" (1993) 52 *Camb. L.J.* 89; T. H. Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 *L.Q.R.* 390.
7. Brownlie, at p. 125.
8. See M. L. Friedland, "Criminal Justice and the Charter" in Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984) at p. 207.
9. See the *Human Rights Law Journal*. Canada acceded to the Optional Protocol at the same time as it acceded to the Covenant: Order-in-Council P.C. 1976-1156 of 18 May 1976.
10. Article 40 of the Covenant. See the *Yearbook of the Human Rights Committee*. See generally, D. McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991).
11. See Friedland, *A Century of Criminal Justice*, at p. 207.

12. Brownlie, at p. 489.
13. Brownlie, at p. 499. See generally, J. T. Fried (Rapporteur), *Report on Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions*, a report prepared for the Inter-American Juridical Committee (Washington, revised version, 28 Nov. 1994).
14. Article 7(1)(d). See Brownlie, at p. 551.
15. See the introduction by Reed Brody to *Special Issue Bulletin 25-26* of the Centre for the Independence of Judges and Lawyers (C.I.J.L.), (Geneva, 1990).
16. *Ibid.* See, e.g., *C.I.J.L. Yearbook: The Judiciary in Transition*, Vol. III, (Geneva: C.I.J.L., 1994); *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers, June 1993-December 1994* (Geneva: C.I.J.L., 1995).
17. Brody, *C.I.J.L. Special Issue Bulletin*, at pp. 7 *et seq.*
18. See chapters 33 and 38 of S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (Netherlands: Martinus Nijhoff, 1985).
19. 1990 *C.I.J.L. Special Issue Bulletin 25-26* at pp. 38 *et seq.* See Brody, at pp. 8-9.
20. Brody, *C.I.J.L. Special Issue Bulletin*, at p. 10.
21. *Ibid.*
22. *Ibid.*, at p. 9.
23. See Fried, at p. 69; M. A. Mishmawi, ed., *C.I.J.L. Yearbook: The Judiciary in Transition*, Vol. III, (Geneva: C.I.J.L., 1994) at p. 11. See also the report by Louis Joinet to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 5 August 1992. And see the work of the International Human Rights Law Institute, De Paul University College of Law, Chicago; D. W. Cassel, "The Independence of the Judiciary Synthesis Report" (1992) 63 *Int. Rev. of Penal Law* 873; M. C. Bassiouni, "Human Rights in the Context of Criminal Justice" (1993) 3 *Duke J. of Comp. & Int'l L.* 235. The first report of the Special Rapporteur, Param Kumaraswamy, was published on 6 February 1995 (E/CN.4/1995/39).

Chapter 1

6. EMERGENCIES

1. See previous section for a discussion of the Covenant.
2. Article 4(2).
3. Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (translation), (Harvard U. Press, 1991) at pp. 46-7. See reviews by DeLloyd Guth, (1992) 26 *U.B.C. Law Rev.* 184; Lee Stuesser, (1992) 7 *Can. J. of Law and Society* 258; and David Dyzenhaus, (1993) 4 *Public Law Rev.* 142.
4. *Ibid.*, at p. 47.
5. *Ibid.*, at p. 37.

6. *Ibid.*
7. *Ibid.*
8. *Ibid.*, at p. 41.
9. C. E-4.5, R.S.C. 1985, c. 22 (4th Supp.).
10. R.S.C. 1970, c. W-2. See the discussion of emergency powers in M. L. Friedland, *National Security: the Legal Dimensions* (Ottawa: Supply and Services, 1980) at pp. 106-115; and "National Security: Some Canadian Legal Perspectives" in M. L. Friedland, *A Century of Criminal Justice* (Toronto: Carswell, 1984) at pp. 141 *et seq.*
11. War Measures Act, s. 6(2).
12. *Ibid.*, s. 2.
13. See M. L. Friedland, *National Security*, at p. 112.
14. S. 6(4).
15. Stat. Can. 1960, c. 44, now found in R.S.C. 1985, App. III.
16. S. 6(5).
17. The four categories are public welfare emergency; public order emergency; international emergency; and war emergency.
18. Emergencies Act, s. 58(1).
19. *Ibid.*, s. 58(7).
20. *Ibid.*, s. 62.
21. *Ibid.*, s. 63.
22. *Ibid.*, s. 4.
23. Canadian Charter of Rights and Freedoms, s. 33.

Chapter 1

7. FURTHER CONSTITUTIONALIZATION OF THE JUDICIARY

1. Supreme and Exchequer Courts Act, 1875, Stat. Can. 1875, c. 11; see now Supreme Court Act, R.S.C. 1985, c. S-26.
2. The controversy is discussed in Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage Books, 1941), Michael Comiskey, "FDR and Court Packing" (1994) 57 *Albany L. Rev.* 1043.

3. See the fascinating discussion in C. F. Forsyth, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (South Africa: Juta, 1985) at pp. 13 *et seq.* The government did it by increasing the quorum for a decision challenging legislation from five to eleven; because there were only six members on the Court the government appointed five new members. Whatever the form, this was Court packing, pure and simple.
4. See Peter Russell, *Constitutional Odyssey*, 2nd ed. (U. of Toronto Press, 1993) at p. 89.
5. *Ibid.*, at p. 100. See *The Constitutional Amendment Bill: Text and Explanatory Notes* (Ottawa, 1978) and the Department of Justice background document, *The Supreme Court of Canada* (Ottawa, 1978).
6. *Ref Re Legislative Authority of the Parliament of Canada in Relation to the Upper House* (1979) 102 D.L.R. (3d) 1, [1980] 1 S.C.R. 54.
7. Constitution Act, 1982, originally enacted as Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
8. Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at p. 72.
9. R.S.C. 1985, c. S-26.
10. R. Cheffins, "The Constitution Act, 1982 and the Amending Formula" (1982) 4 *Supreme Court L. Rev.* 43 at pp. 52-53.
11. *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at p. 68.
12. See F. L. Morton, *Law, Politics and the Judicial Process in Canada*, 2nd ed. (U. of Calgary Press, 1992) at p. 125. Note that s. 52(2) of the Constitution Act uses the word "includes" rather than "means", so it is not stretching the language to say that this aspect of the Supreme Court Act is part of the Constitution.
13. Stat. Can. 1987, c. 42. There may, however, be some parts of the Act (apart from composition) that will require the general amending formula of 7 provinces with 50% of the population: see s. 42(1)(d) of the Constitution Act. Obviously, this whole area requires further clarification.
14. Russell, *Constitutional Odyssey*, at pp. 136-7. See also Hogg, at pp. 222-3 and note 121.
15. *Ibid.*, at p. 205.
16. See also the *Report of the Special Joint Committee on a Renewed Canada* (G. A. Beaudoin and D. Dobbie, chairs) (Ottawa, 1992) at pp. 59-60.
17. Charlottetown Accord, s. 17.
18. *Ibid.*, s. 18. Section 57 states that this would not be subject to the unanimity rule for amendments.
19. *Ibid.*, s. 19.
20. *Ibid.*, s. 20.

21. Russell, *Constitutional Odyssey*, at p. 224.
22. *Ibid.*, at p. 227.
23. Constitution Act, s. 92(14).
24. Jules Deschênes, *Masters in their Own House* (Ottawa: Canadian Judicial Council, 1981).
25. *Ibid.*, at p. 11.
26. *Ibid.*, at p. 13.
27. Judge T. T. Daley's Dalhousie University Master of Laws thesis, "The Duties of the Chief Judges of Provincial and Territorial Courts and their Impact on Judicial Independence" (1994) at p. 41.
28. *Ibid.*, at pp. 41-2.
29. Letter dated 21 October 1991.
30. Letter dated 19 December 1991.
31. Proposed s. 2(1)(a) of the Constitution: see Russell, *Constitutional Odyssey*, at p. 239.
32. *The Judiciary in Canada*, at p. 96.
33. *Ibid.*, at p. 97.
34. *Ibid.*, at p. 97. See also Ian Greene "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada" (1988) 26 *Osgoode Hall Law J.* 177 at pp. 205-6.
35. *The Judiciary in Canada*, at p. 89-90.
36. *Constitutional Law of Canada*, 3rd ed., at pp. 184-6.
37. In *Fraser v. Canada (Public Service Staff Relations Board)* (1985) 23 D.L.R. (4th) 122 at p. 133, [1985] 2 S.C.R. 455, Dickson C.J.C. noted: "There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary." See also *RWDSU Loc 580 v. Dolphin Delivery Ltd.* (1986) 33 D.L.R. (4th) 179 at 196, [1986] 2 S.C.R. 573 at 600 that courts are "one of the three fundamental branches of government". And see also Nemetz C.J.'s "comment" on W. R. Lederman's speech, "The Independence of the Judiciary", in *The Canadian Judiciary* (Allen Linden, ed.) (Toronto: Osgoode Hall Law School, 1976) at p. 13: "The basis of our system stems from the equal and co-ordinate nature of the three branches of government, the legislature, the executive and the judges."
38. *Regina v. Power* (1994) 89 C.C.C. (3d) 1 at p. 13, [1994] 1 S.C.R. 601.
39. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.

CHAPTER TWO: PROTECTING THE JUDICIARY

Chapter 2

1. A. A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford: Clarendon Press, 1993).

Chapter 2

1. PHYSICAL HARM

1. (Ottawa: Canadian Bar Foundation, 1985) at p. 33. In 1992, the Government of Quebec substantially increased the charges to the judges for indoor parking in the Montreal Courthouse. The judges of Quebec brought an action to stop the move and Frappier J. of the Superior Court agreed with their position, which in part relied on threats to their security: *Bisson et al. v. Attorney General of Quebec et al.*, 23 September 1993. Frappier J. stated in part (translation by the Translation Bureau for the Canadian Judicial Council): "it is the Government of Quebec which has the constitutional obligation—the implicit duty—to provide judges with everything necessary for the performance of their duties, and consequently to provide for the security of judges so that justice will be rendered free of any pressure or threats. The government must also guarantee and preserve judicial independence, especially as the Canadian Charter of Rights and Freedoms guarantees litigants a trial before an independent tribunal." I leave it to the reader to decide whether the appeal courts would have taken the same position on the facts of this case. The case was settled, however, on the basis that the judges will continue to pay the former subsidized parking rate: *Globe and Mail*, 28 March 1995.
2. See generally, M. A. Rishmawi (ed.), *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* (Geneva: Centre for the Independence of Judges and Lawyers, 1992), dedicated "to the Colombian and Italian judges who have sacrificed their lives for the cause of justice." The most recent report is the sixth annual report, M. A. Rishmawi (ed.), *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers, June 1993-December 1994* (Geneva, C.I.J.L., 1995).
3. J. T. Fried (Rapporteur), *Report on Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions* (Washington, revised version, 28 Nov. 1994) at pp. 33 and 34, a report prepared for the Inter-American Juridical Committee. And see pp. 47-49 of the report for the techniques adopted in the two countries to counter the threats.
4. 1981, Article 27. See "The Syracuse Draft Principles on the Independence of the Judiciary" in S. Shetreet and J. Deschênes, *Judicial Independence: The Contemporary Debate* (The Netherlands: Martinus Nijhoff, 1985) at pp. 414 *et seq.*
5. See generally, R. W. Carter, "Keeping a Secure Courthouse" (1993) 76 *Judicature* 314. Canadian judges suffer considerable occupational stress, but in a survey done in the late 1980s, fear of physical harm was not then one of the factors creating stress: see J. Rogers, S. Freeman and P. LeSage, "The Occupational Stress of Judges" (1991) 36 *Can. J. of Psychiatry* 317.

Chapter 2

2. POLITICAL INTERFERENCE

1. See Peter Solomon, Jr., "Soviet Politicians and Criminal Prosecutions: The Logic of Party Intervention" in J. R. Millar, ed., *Cracks in the Monolith: Party Power in the Brezhnev Era* (New York: M. E. Sharpe, 1992); "Legality in Soviet Political Culture: A Perspective on Gorbachev's Reforms" in N. Lambert and G. T. Rittersporn, eds., *Stalinism: Its Nature and Aftermath* (New York: M. E. Sharpe, 1992); "The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice" (1987) 39 *Soviet Studies* 531.
2. See Robert Sharlet, "Chief Justice as Judicial Politician" [1993] *East European Constitutional Review* 32; "The Russian Constitutional Court: The First Term" (1993) 9 *Post Soviet Affairs* 1. See also the later developments leading to the resignation of Zorkin and the suspension of the Constitutional Court: *Globe and Mail*, Sept. 22, 23 and 25, October 7 and 8, 1993; and see Robert Sharlet, "Russian Constitutional Crisis: Law and Politics under Yel'tsin" (1993) 9 *Post Soviet Affairs* 314. In addition, see Christin Schmitz, "Life on the Russian Bench" 14 *Lawyers Weekly*, January 13, 1995. The Constitutional Court was recently revived with the addition of 6 new judges, who, along with the 13 judges who belonged to the previous court, make up the 19-person Court. The new chair is the legal academic, Vladimir Tumanov: see *Globe and Mail*, 15 February 1995.
3. See generally, Peter Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 78-81; Hansard, *House of Commons*, 3 March 1976 to 16 March 1976. For a reference to an earlier case of interference, which was not publicly known at the time, see J. G. Snell and F. Vaughan, *The Supreme Court of Canada* (U. of Toronto Press, 1985) at p. 100, in which Mackenzie King, in 1911, then the minister of labour, appeared to have made a direct attempt to influence the decision in a case in which he was personally interested.
4. See Russell, *The Judiciary in Canada*, at pp. 78-9.
5. *House of Commons Debates*, (12 March 1976) at pp. 11776 *et seq.*
6. *Ibid.*, at p. 11778.
7. *Ibid.*, at p. 11779.
8. *Ibid.*, at p. 11742.
9. *Ibid.*, at p. 11771.
10. There were guidelines by Prime Ministers Lester Pearson in 1964 and Pierre Trudeau in 1973: see Ian Greene, "Conflict of Interest and the Canadian Constitution: An Analysis of Conflict of Interest Rules for Canadian Cabinet Ministers" (1990) 23 *Can. J. of Political Science* 233 at pp. 246-7. Trudeau stated, Hansard, 12 March 1976 at p. 11746, that when they tabled the 1973 conflict of interest rules, they "did not at that time consider the question of the relationship between the ministry and the judges."
11. *House of Commons Debates*, (12 March 1976) at p. 11771.
12. *Ibid.*
13. Russell, *The Judiciary in Canada*, at p. 80.
14. See F. L. Morton (ed.) *Law, Politics and the Judicial Process in Canada*, 2nd ed., (Calgary: U. of Calgary Press, 1992) at p. 126.

15. Conversation with and documents kindly sent by Gordon A. Parks, Chief Advisor, Office of the Ethics Counsellor, December 1994. The guidelines are, however, extensively cited in Greene, "Conflict of Interest and the Canadian Constitution", at pp. 247-8. A package of measures was tabled on 16 June 1994, strengthening conflict of interest and lobbying issues and appointing the first Ethics Counsellor. The revised Conflict of Interest and Post-Employment Code for Public Office Holders, 1994, does not include judges.
16. *House of Commons Debates*, (31 October 1994) at p. 7410.
17. *Ibid.*
18. *Ibid.*, at pp. 7409 *et seq.*
19. Russell, *The Judiciary in Canada*, at pp. 80-1.
20. Report of The Hon. Mr. Justice P. D. Seaton, Commissioner under a Commission of Inquiry Pursuant to Order-in-Council #1885, 23 October, 1979.
21. *Ibid.*, at p. 3.
22. *Ibid.*, at pp. 1-2. For a discussion of the interventions by Attorneys General into the conduct of provincial courts (then called magistrates courts) in the 1960s, see John Hogarth, *Sentencing as a Human Process* (U. of Toronto Press, 1971) at pp. 193-6.
23. *Debates of the Legislative Assembly of Ontario*, (12 December 1990) at p. 2613.
24. Members' Conflict of Interest Act, R.S.O. 1990, c. M.6.
25. Premier's Guidelines with respect to Conflict of Interest, tabled 12 December 1990, Article 19.
26. Members' Conflict of Interest Act, R.S.O. 1990, c. M.6, ss. 11 and 12. See now the Members' Integrity Act, 1994, Stat. Ont. which received Royal Assent on December 9th, 1994, but as of 30 April 1995, not yet proclaimed.
27. See Commission on Conflict of Interest, Annual Reports, Inquiry No. 32 in 1993-94, and Inquiries No. 6 and 22 in 1992-93.
28. *Ibid.*, Inquiry No. 32, at p. 13 of 1993-94 Annual Report.

Chapter 2

3. CONTEMPT OF COURT

1. I am indebted to an article by Jack Watson, "Badmouthing the Bench" (1992) 56 *Sask. L. Rev.* 113, for this classification.
2. Section 9 states that no person shall be convicted of an offence at common law and then states: "but nothing in this section affects the power, jurisdiction or authority that a court, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court."
3. *Glasner* (1994) 19 O.R. (3d) 739 (Ont. C.A.) at p. 748.
4. See *Vermette* (1987) 32 C.C.C. (3d) 519 at 521-24, 38 D.L.R. (4th) 419, [1987] 1 S.C.R. 577; *C.B.C. v. Que. Police Commission* (1979) 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24, [1979] 2 S.C.R. 618.

5. See *United Nurses of Alberta v. A.-G. for Alberta* (1992) 71 C.C.C. (3d) 225, 89 D.L.R. (4th) 609, [1992] 1 S.C.R. 901.
6. *Cohn* (1984) 15 C.C.C. (3d) 150 (Ont. C.A.). See also Lamer C.J.C. in *Vidéotron v. Ind. Microlec Prod. Électroniques* (1992) 76 C.C.C. (3d) 289 at 293, 96 D.L.R. (4th) 376, [1992] 2 S.C.R. 1065; *B.C.G.E.U. v. A.-G. B.C.* (1988) 44 C.C.C. (3d) 289 at 312 *per* Dickson C.J.C., 53 D.L.R. (4th) 1, [1988] 2 S.C.R. 214. And see P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at p. 847, note 91, and generally at pp. 984-6.
7. *Cohn, supra.*
8. *Martin* (1985) 19 C.C.C. (3d) 248 (Ont. C.A.).
9. *Vidéotron v. Ind. Microlec Prod. Électroniques, supra.*, a case based on the Quebec Code of Civil Procedure.
10. *B.C.G.E.U. v. A.-G. B.C., supra.*
11. *Ibid.*, at p. 299 C.C.C.
12. See, e.g., *Alberta (A.-G.) v. Interwest Publications Ltd.* (1990) 58 C.C.C. (3d) 114 (Alberta Q.B.). See generally, J. Allen and T. Allen, "Publication Restrictions and Criminal Proceedings" (1994) 36 *Crim. L. Q.* 168. This is sometimes referred to as *sub judice* contempt. The *sub judice* rule, in my view, more appropriately refers to the parliamentary convention, often not followed, that debate should not take place on matters that are before the courts. See W. R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. B. Rev.* 769 at pp. 788-9.
13. *Glasner* (1994) 19 O.R. (3d) 739 (Ont. C.A.) at p. 748.
14. *Ibid.*, at p. 750, citing the earlier case of *Carter* (1993), unreported (Ont. C.A.).
15. *United Nurses of Alberta v. A.-G. for Alberta, supra.* See also *MacMillan Bloedel v. Simpson* (1994) 89 C.C.C. (3d) 217 (B.C.C.A.).
16. *United Nurses*, at p. 253 C.C.C.
17. *Ibid.*
18. *Gray* [1900] 2 Q.B. 36 (C.A.). See Robert Stevens, *The Independence of the Judiciary* (Oxford: Clarendon Press, 1993) at p. 5: "The idea that criticizing a judge might be contempt of court was invented by the Court of Appeal in 1900 to protect Mr. Justice Darling."
19. See Watson, "Badmouthing the Bench", at p. 158. The law reports do not set out the passage.
20. See *McLeod v. St. Aubyn* [1899] A.C. 549 (P.C.). The offence bears some similarity to seditious libel: see M. L. Friedland, *National Security: The Legal Dimensions* (Ottawa, 1979) at pp. 19-22; Dubin C.J.O. in *Kopyto* (1987) 39 C.C.C. (3d) 1 (Ont. C.A.) at pp. 65-6.
21. *Re Duncan* (1957) 11 D.L.R. (2d) 616, [1958] S.C.R. 41; *Poje et al. v. A.G.B.C.* (1953) 105 C.C.C. 311, [1953] 2 D.L.R. 785, [1953] S.C.R. 516.
22. (1987) 39 C.C.C. (3d) 1 (Ont. C.A.).
23. See generally, Watson, "Badmouthing the Bench", at pp. 159 *et seq.*
24. *Kopyto*, at pp. 7-8.

25. *Ibid.*, at p. 29.
26. *Ibid.*, at p. 51.
27. See *Collins* (1987) 33 C.C.C. (3d) 1, 38 D.L.R. (4th) 508, [1987] 1 S.C.R. 265.
28. See *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
29. *Kopyto*, at pp. 65 *et seq.*
30. *Ibid.*, at p. 78.
31. (Canadian Judicial Council, 1992), at p. 28.
32. See, however, *B.C.G.E.U. v. A.G.B.C.*, at p. 303 C.C.C., in which Dickson C.J.C. sets out without disapproval McIntyre J.A.'s citation of *Gray, Duncan, and Poje*.
33. See *Re Ouellet* (1976) 28 C.C.C. (2d) 360, 34 C.R.N.S. 234 (Quebec S.C.) *per* Hugessen A.C.J., affirmed (1976) 32 C.C.C. (2d) 149, 72 D.L.R. (3d) 95.
34. See *Globe and Mail* 2 September 1993.

Chapter 2

4. IMMUNITY FROM CIVIL AND CRIMINAL PROCESS

1. Article 2.24 of the 1983 Universal Declaration on the Independence of Justice, set out in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (Netherlands: Martinus Nijhoff, 1985) at p. 452.
2. Article 16 of the 1985 U.N.'s *Basic Principles on the Independence of the Judiciary* (endorsed by the U.N. General Assembly, 1985).
3. See *Morier v. Rivard* (1985) 23 D.L.R. (4th) 1, [1985] 2 S.C.R. 716.
4. See *Shaw v. Trudel* (1988) 53 D.L.R. 481 (Man. C.A.).
5. A. A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Oxford: Clarendon Press, 1993) at p. 192. See also J. M. Shaman, "Judicial Immunity from Civil and Criminal Liability" (1990) 27 *San Diego L. Rev.* 1.
6. Olowofoyeku, at p. 221.
7. *Nelles v. Ontario* (1989) 60 D.L.R. (4th) 609, [1989] 2 S.C.R. 170.
8. J. M. Law, "A Tale of Two Immunities: Judicial and Prosecutorial Immunities in Canada" (1990) 28 *Alberta L. Rev.* 468 at p. 482.
9. *Forrester v. White* 484 U.S. 219 at 226 (1988).
10. *Floyd v. Barker* (1607) 12 Co. Rep. 23, 77 E.R. 1305 at 1307. See Shaman, "Judicial Immunity", at p. 4.
11. *Sirros v. Moore* [1975] 1 Q.B. 118 at pp. 132 and 135 (C.A.).
12. *Fray v. Blackburn* (1863) 3 B. & S. 576 at 578, 122 E.R. 217 at 217.

13. *Sirros v. Moore*, at p. 136.
14. *McC. v. Mullan* [1984] 3 All E.R. 908 (H.L.).
15. *Ibid.*, at p. 916.
16. Habeas Corpus Act, 1679, s. 9. See Olowofoyeku, *Suing Judges*, at p. 60; R. J. Sharpe, *Habeas Corpus*, 2nd ed., (Oxford: Clarendon Press, 1989) at pp. 19-20.
17. 13 Wall 335 at 347, 80 U.S. 335 at 347 (1872).
18. Shaman, "Judicial Immunity", at pp. 5-6.
19. *Butz v. Economou* 438 U.S. 478 (1978).
20. *Stump v. Sparkman* 435 U.S. 349 at 356-7. See also *Mireless v. Waco* 112 S. Ct. 286 (1991).
21. *Stump v. Sparkman*, at p. 367.
22. *Forrester v. White*, *supra*.
23. 466 U.S. 522 (1984).
24. See Peter Shuck, "The Civil Liability of Judges in the United States" (1989) 37 *Am. J. of Comp. Law* 655 at p. 665; D. Cohen, "Judicial Malpractice Insurance? The Judiciary Responds to the Loss of Absolute Judicial Immunity" (1990) 41 *Case Western L. Rev.* 267; W. W. Reynoldson, "The Erosion of Judicial Immunity" (1985) 69 *Judicature* 114.
25. Shuck, at p. 665.
26. (1989) 50 C.C.C. (3d) 449, [1989] 2 S.C.R. 796.
27. *Morier v. Rivard* (1985) 23 D.L.R. (4th) 1 at 22 *per* Chouinard J.
28. Magistrates Privileges Act, R.S.Q., c. P-24, s. 1.
29. Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 16(1).
30. Canadian Bar Association Special Committee, *The Independence of the Judiciary in Canada* (Ottawa: The Canadian Bar Foundation, 1985) at p. 21.
31. *Shaw v. Trudel* (1988) 53 D.L.R. (4th) 481 (Man. C.A.). See also *Unterreiner v. Wilson* (1982) 142 D.L.R. (3d) 588 (Ont. H. Ct.), *aff'd* in 146 D.L.R. (3d) 322 (Ont. C.A.). Denning's judgment to this effect in *Sirros v. Moore* [1975] 1 Q.B. 118 was rejected by the House of Lords in *McC. v. Mullen* [1984] 3 All E.R. 908.
32. Chapter one, section 4(D).
33. Shuck, at p. 666.
34. See the discussion in Shuck, at pp. 667-8.
35. *Germain* (1984) 53 A.R. 264 (Alberta Q.B.), discussed in Law, "A Tale of Two Immunities" at pp. 493-4.
36. Cf. Law, "A Tale of Two Immunities", at p. 518, who states: "The citizen should not be forced to seek his remedy through appellate review."

37. There is absolute immunity for both in the U.S.: see *Imbler v. Pachtman* 424 U.S. 409 (1976).
38. See generally, Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 1994) at 11.340 *et seq.*
39. *Dagenais v. C.B.C.* (1994) 94 C.C.C. (3d) 289, [1994] 3 S.C.R. 835.
40. *Allen v. Manitoba* [1993] 3 W.W.R. 749 (Man. C.A.).
41. See the *Report of the National Commission on Discipline and Removal* (Washington, 1993) at p. 12.
42. See *Ottawa Citizen*, 4 March 1992.
43. *Report of the National Commission*, at p. 72.
44. *Ibid.*, at p. 73.
45. See Shaman, "Judicial Immunity", at p. 18. See generally, Maria Simon, "Prosecution or Impeachment" (1994) 94 *Columbia L. Rev.* 1617.
46. Olowofoyeku, *Suing Judges*, at pp. 74 *et seq.*; and see *Re Fleming and the Queen* (1985) 24 C.C.C. (3d) 264 at 271 (Newfoundland C.A.).
47. *Ex parte Virginia* 100 U.S. 339 (1880).

Chapter 2

5. REMOVAL OF JURISDICTION

1. Article 2.06. See S. Shetreet and J. Deschênes, *Judicial Independence: The Contemporary Debate* (Netherlands: Martinus Nijhoff, 1985) at p. 450.
2. See Justice Michael Kirby, "Abolition of Courts and Non-reappointment of Judicial Officers" (1995) 12 *Australian Bar Rev.* 181.
3. See generally, the fine 1993 Osgoode Hall LL.M. thesis by G. A. Barry, "The Two Principles of the Judicature Provisions: The Relationship of Section 96 Courts and Inferior Courts."
4. *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at pp. 185-6.
5. *Reference Re Residential Tenancies Act* (1981) 123 D.L.R. (3d) 554 at 567, [1981] 1 S.C.R. 714 at 728.
6. P. Macklem *et al.* (eds.) *Canadian Constitutional Law* (Toronto: Emond Montgomery, 1994) at p. 420.
7. Hogg, at p. 186.
8. *Reference Re Residential Tenancies Act*, *supra*.
9. *McEvoy v. A.-G. N.B.* (1983) 4 C.C.C. (3d) 289, 148 D.L.R. (3d) 25, [1983] 1 S.C.R. 704.
10. Hogg, at p. 196.
11. Peter Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at p. 61.

12. S. 96B, set out in Macklem *et al.*, *Canadian Constitutional Law*, at pp. 451-2.
13. Hogg, at p. 196.
14. Russell, at p. 63.
15. *Ibid.*
16. W. R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at p. 167.
17. *Sobey Stores v. Yeomans and Labour Standards Tribunal* (1989) 57 D.L.R. (4th) 1, [1989] 1 S.C.R. (4th) 238.
18. *Ibid.*, at p. 33 D.L.R.
19. *Ibid.*, *Per La Forest J.* at p. 38 D.L.R.
20. *Cr  vier v. Quebec (A.G.)* (1981) 127 D.L.R. (3d) 1, [1981] 2 S.C.R. 220.
21. *Ibid.*, at p. 12 D.L.R.
22. Katherine Swinton, *The Supreme Court and Canadian Federalism* (Toronto: Carswell, 1990) at p. 250.
23. (1993) 78 C.C.C. (3d) 510, [1993] 1 S.C.R. 416.
24. *Ibid.*, at p. 514 C.C.C.
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*
28. (1991) 66 C.C.C.(3d) 321, [1991] 2 S.C.R. 577.
29. (1991) 63 C.C.C. (3d) 481, [1991] 1 S.C.R. 933.
30. (1987) 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045.
31. The present classification between first and second degree murder was upheld by the Supreme Court of Canada in *Luxton* (1990) 58 C.C.C. (3d) 449, [1990] 2 S.C.R. 711 and *Arkell* (1990) 59 C.C.C. 65, [1990] 2 S.C.R. 695. A victim surcharge was upheld by the Nova Scotia Court of Appeal in *Cowell* (1992) 76 C.C.C. (3d) 413 at 418 and 420, even though the court stated that "it is a limitation on both the discretion and the independence of the judiciary", but the legislation gave the court a "discretion as to the percentage of fine, and, it can be avoided on grounds of hardship".
32. *Palling v. Corfield* (1970) 123 C.L.R. 52 at 58 (H.C. of A.).
33. 488 U.S. 361 (1989). Many federal judges are still concerned, however, about the effect of the legislation on their independence: see G. Bermant and R. R. Wheeler, "Federal Judges and the Judicial Branch: Their Independence and Accountability", forthcoming 1995, *Mercer Law Review*.

34. Lord Hailsham, the former Lord Chancellor, argued in June 1989 that establishing a Sentencing Council would be unconstitutional: see note 13 on p. 337 of A. Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld and Nicholson, 1992). Lord Taylor L.C.J. stated in March, 1993 that a Sentencing Council would "usurp the function of the independent judiciary and there could be a real danger of politicizing the sentencing process." See "Judges and Sentencing" [1993] *Commonwealth Law Bulletin* 763.
35. *Sentencing and Criminal Justice*, at p. 39.
36. *Ibid.*
37. See generally, the Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa, 1987).
38. *Sentencing and Criminal Justice*, at p. 46.

CHAPTER THREE: SECURITY OF TENURE

Chapter 3

1. (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
2. *Ibid.*, at p. 208 C.C.C.
3. Act of Settlement 1701, 12 & 13 William III, c.2.
4. See W. R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. B. Rev.* 1139 at p. 1150. This statute applied to the King's Bench in Upper Canada. A similar statute for other courts in Upper Canada and for courts in Lower Canada was passed in 1843, Statutes of Canada, (1843) 7 Vict., c.15. See generally, chapter 1, section 2.
5. British North America Act, 1867, 30 & 31 Vict., c.3 (U.K.), s.99.

Chapter 3

1. RETIREMENT AGE

1. See Constitution Act, 1960, 9 Eliz. II, c.2 (U.K.); reprinted in R.S.C. 1985, App. II, No.37; came into force 1 March 1961.
2. S.99(2), Constitution Act, 1867, as amended.
3. See s.8 of An Act to Amend the Judges Act, R.S.C. 1970 (2nd Supp.), c.16. The section was not retroactive. The age had been reduced to 75 in 1913 for county and district court judges: An Act to Amend the Judges Act, Stat. Can. 1913, c.28, s.9. See p.6666 of *House of Commons Debates* (14 June 1971). County and district courts no longer exist in Canada, having been eliminated province by province by provincial legislation.
4. Federal Court Act, R.S.C. 1970, c.10 (2nd Supp.), s.8(2).
5. *Addy v. The Queen* (1985) 22 D.L.R. (4th) 52, [1985] 2 F.C. 452 (T.D.). Addy J. won on the basis of the equality section, but also on the more persuasive ground that Federal Court judges are superior court judges within the meaning of s.99 of the Constitution. Addy had been a superior court judge in Ontario and transferred to the Federal Court in 1973. But even the argument that Federal Court judges are superior court judges is debatable. It is true that

Lederman speculated ((1956) 34 *Can. B. Rev.* 1139 at p.1176), that “the judges of federal superior courts are in the same position respecting salary, tenure, retirement and removal as judges of the provincial superior courts, and for the same constitutional reasons”, but Bora Laskin’s extra-judicial reply to this argument was that “there is no tenable ground of history or text to support the suggestion”: B. Laskin, *Canadian Constitutional Law*, 4th ed. Rev. (Toronto: Carswell, 1975) at p.76.

6. *House of Commons Debates*, Vol. IV (27 March 1987) at p. 4643. See also P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto: Carswell, 1992) at p.184, fn 116.
7. *House of Commons Debates*, *ibid.*, at p.4642; *House of Commons Debates* (23 June 1987) at p.7510.
8. An Act to Amend the Judges Act, the Federal Court Act and the Tax Court of Canada Act, Stat.Can. 1987, c.21, ss. 4, 7 & 8.
9. See, e.g., Prince Edward Island: Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s.7; Newfoundland: Provincial Court Act, R.S.N. 1991, c.15, s.12.
10. See, e.g., Quebec: Courts of Justice Act, R.S.Q., c. T-16, s. 92.1, introduced by Stat. Quebec 1990, c.44, s.3.
11. See, e.g., New Brunswick: Provincial Court Act, R.S.N.B. 1973, c. P-21, s.6; Manitoba: Provincial Court Amendment Act, S.M. 1989-90, c. 34, s.3.
12. In Quebec, for example, the Government may authorize an extension if it “deems that it serves the interests of justice”: s.92.1, Courts of Justice Act, R.S.Q., c. T-16, introduced by Stat. Quebec, 1990, c.44, s.3. Nova Scotia allows the Governor in Council to retain a judge beyond the retirement age if it is in the public interest: s.6(3), Judges of Provincial Court Act, R.S.N.S. 1989, c.238, s.6. See the discussion of this issue in *Valente* (1982) 2 C.C.C. (3d) 417 (Ont.C.A.), and *Re Fleming and the Queen* (1985) 24 C.C.C.(3d) 264 (Nfld. S.C., T.D.), which are considered in the next section.
13. An Act to amend the Judges Act, Stat. Can. 1930, c.27, s.1.
14. An Act to amend the Supreme and Exchequer Courts Act, the Exchequer Court Act, and the Act respecting the Judges of Provincial Courts, Stat. Can. 1903, c.29, s.1. Under s.2, county court judges had to be age 75 and have served 25 years to receive a pension.
15. Mr. R.B. Bennett, *House of Commons Debates*, Vol. V (10 May 1933) at pp.4790 and 4798.
16. *House of Commons Debates* (10 May 1933) at p.4811; *Senate Debates* (16 May 1933) at p.531.
17. Ernest Lapointe, *House of Commons Debates*, Vol. IV (15 June 1936) at p.3705; see also, *House of Commons Debates*, Vol. IV (30 June 1938) at p.4434.
18. An Act to amend the Supreme Court Act, Stat. Can. 1926-27, c.38, s.2.
19. U.S. Const. art. III, s.1.
20. 28 U.S.C. 371(a).
21. 28 U.S.C. 371(b)(1).

22. T. Baker, *The Good Judge: Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility* (New York: Priority Press, 1989) at p.83.
23. *Ibid.*
24. *Gregory v. Ashcroft* 111 S.Ct. 2395 (1991). See J.M. Shaman, "Supreme Court upholds mandatory retirement of state judges" (1992) 75 *Judicature* 222.
25. *Ibid.*, at p.2407.
26. Library of Congress, "Judicial Tenure: The Removal and Discipline of Judges in Selected Foreign Countries," in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol.II, (Washington: National Commission, 1993) 1459 at p.1568.
27. W.K. Slate, "New Paradigms of Judicial Discipline: Application of Foreign Models in the American System" in *Research Papers of the National Commission* Vol. II, 1405 at p.1407. See also, *Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits*, Tab 9.
28. Judicial Pensions Act, 1959, 8 & 9 Eliz. 2, c.9. See also, E.C.S. Wade & A.W. Bradley, *Constitutional and Administrative Law*, 11th ed. (London: Longman, 1993) at pp.377-378; Robert Stevens (Chair of Committee on the Judiciary), *A Report by Justice, The Judiciary in England and Wales*. (London: Justice, 1992) at p.18.
29. See Wade & Bradley, at p.377; *Justice Report*, at p.18.
30. Judicial Pensions and Retirement Act 1993 (U.K.), 1993, c.8, s.26(1). See also Wade & Bradley, at p.378; *Justice Report* at p.18.
31. Judicial Pensions and Retirement Act 1993 (U.K.), 1993, c.8, s.26(5) & (6). See also, Wade & Bradley, at p.378; *Justice Report* at p.18.
32. See *The Times*, 29 March 1995.
33. Judicial Pensions and Retirement Act 1993 (U.K.), 1993, c.8, s.26(3).
34. See *House of Lords Debates* (16 June 1992) at p.123.
35. See *Justice Report* at pp. 18-19; *House of Lords Debates* (16 June 1992) at p.124.
36. See, e.g., Mr. Boateng in the House of Commons, *House of Commons Debates* (3 December 1992) at pp.438-439, 479-481, and (15 February 1993) at pp.95-97; Lord Benson in the House of Lords, *House of Lords Debates* (16 June 1992) at pp.151-154.
37. *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at 294.
38. The Constitutional Amendment Bill (Government of Canada, 1978), ss.109, 119, 144, and 145. The 1971 Victoria Charter proposed with respect to the Supreme Court of Canada that the judges hold office until age 70: see article 34.
39. Stat. Can. 1987, c.21, ss. 4, 7 & 8.
40. See Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p.83.
41. *Addy v. The Queen* (1985), *supra*.

42. *House of Commons Debates*, Vol. IV (27 March 1987) at pp.4642-3.
43. *Ibid.*, at p.4643.
44. *Ibid.*
45. *Law Society of British Columbia v. Andrews* (1989) 56 D.L.R. (4th) 1 (S.C.C.) [1989] 1 S.C.R. 132; *McKinney v. University of Guelph* [1990] 3 S.C.R. 229. The trial judge, Grant J., in the *Addy* case had stated the question at p.63: "whether equality rights guaranteed by the section have been breached against a person with that of a group of persons who substantially belong to the same class and are similarly circumstanced." Such a test was rejected by the Supreme Court of Canada in *Andrews* where McIntyre J. stated (at p.12 D.L.R.): "mere equality of application to similarly situated groups or individuals does not afford a realistic test for violation of equality rights." The judges would surely not be considered a "discrete and insular minority" (see p.24) who come within the protection of s.15.

Chapter 3

2. SUPERNUMERARY STATUS

1. An Act to amend the Judges Act, R.S.C. 1970, c.16 (2nd Supp.), s.5, adding s.20.1. Note that complementary provincial legislation is required to create the office of supernumerary judge. See s.29 of the Judges Act for the enabling federal legislation: R.S.C. 1985, c. J-1. For provincial legislation, see, e.g., ss. 6 and 21 of the Quebec Courts of Justice Act which allow a maximum of 20 supernumerary judges on the Quebec Court of Appeal and 111 on the Superior Court: see Courts of Justice Act, R.S.Q., c. T-16. See generally, P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at pp.174-175.
2. Mandatory retirement, as discussed in the previous section, was set at age 75 by a constitutional amendment in 1960: see Constitution Act, 1960, 9 Eliz. II, c.2, (U.K.), reprinted in R.S.C. 1985, App.II, No.37.
3. See ss.28(4), 29(4) and 30(4), Judges Act, R.S.C. 1985, c.J-1.
4. Mr. Albert Béchard, *House of Commons Debates*, Vol. VII (14 June 1971) at p.6666.
5. An Act to amend the Judges Act, R.S.C. 1970, c.16 (2nd Supp.), s.5, adding s.20.1.
6. An Act to Amend the Judges Act, Stat. Can. 1973, c.17, s.6, amending s.20.1.
7. Retirement age for county court judges was set at 70 in 1971 for future appointments. See An Act to amend the Judges Act, R.S.C. 1970, c.16 (2nd Supp.), s.8.
8. Stat. Can. 1987, c.21, ss.4, 7 & 8.
9. Judges of the Supreme Court of Canada are not eligible for supernumerary status. From 1981-1990, of the 195 judges that were eligible for supernumerary status, 92% took it immediately (within 1 year), 4% within 2 years and the remaining 4% took it eventually. See Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits, Tab 10 at p.2, which states: "Thus, 100% of judges eligible to elect supernumerary status actually did so."
10. Projection from *ibid.*, Tab 10 at pp.2 and 7. As of January 1, 1995, there were 170 supernumerary judges out of 950 federally appointed judges.

11. The Judges Act states that a supernumerary judge "shall hold himself available to perform such special judicial duties as may be assigned to the judge." R.S.C. 1985, c. J-1, ss. 28(3), 29(3) and 30(3).
12. Judges appointed before 16 February 1975 must contribute 1.5 % of their salary towards their pensions, while judges appointed after 16 February 1975 must contribute 7%: see Judges Act, R.S.C. 1975, c. J-1, s.50.
13. Brief of the Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges Conference to the 1992 Commission on Judges' Salaries and Benefits (1992) at pp.40-41.
14. New Brunswick passed legislation in early 1995 forcing provincial supernumerary judges to retire or return to full-time service. Retired judges could be called back on a *per diem* basis. See *Lawyers Weekly* 17 March 1995. The legislation is apparently being challenged by one of the judges.
15. For example, as of 31 December 1991, Ontario had over 50 supernumerary judges, Quebec and British Columbia had over 20 each. See Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits, Tab 10 at pp.2 and 9. As of 1 April 1995, Ontario had 49 supernumerary judges and the number of supernumerary judges in Quebec and British Columbia had risen to 39 and 23, respectively; communication with Harold Sandell, Department of Justice, Ottawa.
16. See British Columbia Court of Appeal 1992 *Annual Report* at p.6. The numbers will normally be greater for court of appeal judges because many court of appeal judges will first have built up years of service at the trial level and so can take supernumerary status without having served 15 years on the court of appeal.
17. See Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits, Tab 10 at p.2.
18. *Ibid.*
19. *Ibid.*
20. Approximately 120 appeals were heard by the Supreme Court in 1994. See Supreme Court of Canada Bulletin of Proceedings, 16 December 1994, cumulative index of appeals heard in 1994, at pp.2010-2014.
21. See Chief Justice Charles Dubin, "The Future of Our Profession and of Our Justice System" (1994) 28 *Law Society Gazette* 201 at p. 209: "What is needed is a final court for this province, small in number—seven or nine, which would sit en banc, or at least at all times with a majority of its members."
22. See, e.g., New York State: F. Bergan, *The History of the New York Court of Appeals* (New York: Columbia U. Press, 1985). The Zuber Report recommended that an intermediate court of appeal be created in Ontario by converting the Divisional Court into an intermediate court. See *Report of the Ontario Courts Inquiry*, (the Zuber Report) (Toronto: Ministry of the Attorney General, 1987) at pp.119-121 and 279-280.
23. Judicial Pensions and Retirement Act 1993, (U.K.), 1993, c.8, s.26(5) and (6); see also, the speech by the Lord Chancellor, Lord Mackay, *House of Lords Debates* (16 June 1992) at p.123.

24. Judicial Pensions and Retirement Act 1993, s.26(5). See also, *House of Lords Debates* (16 June 1992) at p.123.
25. *House of Lords Debates* (16 June 1992) at p.123.
26. 28 U.S.C. 371(a) & 371(c).
27. 28 U.S.C. 371(b) and 371(f).
28. 28 U.S.C. 371(b)(1).
29. 28 U.S.C. 371(f)(1).
30. *Ibid.* The chief justice certifies justices and the chief circuit judge certifies judges of the circuit.
31. See Jules Deschênes, *Masters in their own House* (Ottawa: C.J.C., 1981) at p.112-3.
32. *Report and Recommendations of the 1992 [Crawford] Commission on Judges' Salaries and Benefits*. (Ottawa: Ministry of Supply and Services, 1993) at p.24.
33. The Government Brief to the Crawford Commission suggested limiting the duration of the supernumerary office to 3 years. See Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits, Tab 10 at p.4.
34. The Government Brief to the Crawford Commission stated that one-third the workload of a regular judge had been suggested by some as a benchmark. See Background Document submitted by the Government of Canada to the 1992 [Crawford] Commission on Judges' Salaries and Benefits, Tab 10 at p.1. However, the Brief of the Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges Conference to the 1992 Commission on Judges' Salaries and Benefits at pp.39-40 suggested that supernumerary judges undertake 50% of the workload of that of a regular judge.
35. One province, for example, requires a minimum of 11 weeks for trial judges, whereas another requires judges to sit half the time regular judges sit. See Judicial Support Services Questionnaire for Trial Courts 1993, conducted by the C.J.C.
36. Memorandum on Supernumerary Status adopted by the Saskatchewan Court of Appeal on 1 June 1994.
37. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.16, amending s.47.
38. *Ibid.*, s.47(3).
39. *Ibid.*, s.47(5) and (6).
40. Judges of the Provincial Court Act, R.S.N.S. 1989, c.238, s.6(3).
41. Courts of Justice Act, c. T-16, s.92(1), introduced by S.Q. 1990, c.44, s.3.
42. Provincial Court Act, R.S.P.E.I., 1988, c. P-25.
43. Provincial Court Act, 1991, R.S.N. 1991, c.15.
44. *Re Fleming and the Queen* (1985) 24 C.C.C.(3d) 264 (Nfld. S.C., T.D.).
45. *Valente* (1985) 23 C.C.C.(3d) 193, 24 D.L.R.(4th) 161, [1985] 2 S.C.R. 673.

46. Provincial Courts Act, R.S.O. 1980, c.398, s.5.
47. *Valente No. 2* (1982) 2 C.C.C.(3d) 417, 145 D.L.R. (3d) 452 (Ont. C.A.). The Ontario Court of Appeal upheld the provision in a qualified manner. Howland C.J. stated at p. 441 C.C.C.:

Appointments at pleasure are a matter of concern where independence is concerned. However, as already noted, a tradition has been established by the present Attorney-General over the last seven years only to make such reappointments on the recommendation of the chief judge of the appropriate provincial court. I do not consider this provision as to reappointments at pleasure to be of sufficient gravity as to lead a reasonable man to conclude that the tribunal was not independent and impartial, particularly in the light of the tradition which has been established by the Attorney-General. I have also noted the willingness of the Attorney-General to introduce an amendment to the *Provincial Courts Act* in this connection, substituting the approval of a chief judge for his approval.

48. Provincial Courts Amendment Act, S.O. 1983, c.18, s.1; Courts of Justice Act, S.O. 1984, c.11.
49. *Valente* (S.C.C.), at p.215 C.C.C.
50. *Ibid.*

Chapter 3

3. INCAPACITY

1. Constitution Act, 1867, (U.K.), 30 & 31 Vict., c.3, s.99, reprinted in R.S.C. 1985, App.II, No.5.
2. *Gratton v. Canada (Judicial Council)* (1994) 115 D.L.R.(4th) 81, [1994] F.C.J. 710 (F.C.T.D.).
3. Judges Act, R.S.C. 1985, c.J-1, s.42(1)(c); see also s.65(2).
4. Document dated 3 August 1994 from the Commissioner for Federal Judicial Affairs.
5. See Judges Act, R.S.C. 1970, c.159, s.23(1).
6. *Landreville v. The Queen (No.3)* (1980) 111 D.L.R.(3d) 36, [1981] F.C. 15 (F.C.T.D.).
7. Stat. Can. 1981, c.50, s.16, amending s.23(1) of R.S.C. 1970, c.159, now s.42(1) of R.S.C. 1985, c.5-1.
8. Judges Act, R.S.C. 1985, c.J-1, s.42(1)(c).
9. Remarks of the Minister of Justice, Kim Campbell, to the Canadian Judicial Council, Ottawa, 20 March 1992.
10. Judges Act, R.S.C. 1985, c.J-1, s.66(2).
11. Judges Act, R.S.C. 1985, c.J-1.
12. Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p.85.
13. See R. McGregor Dawson, *The Government of Canada* (U. of Toronto Press, 1954) at p.439, citing *House of Commons Debates*, 2 Feb. 1943, at pp.72-3 and 2 Aug. 1946 at p.4270.

14. An Act to Amend the Judges Act and other Acts in Relation to Judicial Matters, R.S.C. 1985, c.27 (2nd Supp.), s.6.
15. Canadian Judicial Council, *Annual Report, 1993-94*, at p.23.
16. An Act to Amend the Judges Act, Stat. Can. 1922, c.29, s.2.
17. W.R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. B. Rev.* 1139 at p.1163.
18. *Ibid.*
19. An Act to Amend the Judges Act, R.S.C. 1970, c.16 (2nd Supp.) s.10, amending s.32 of the Judges Act, R.S.C. 1970, c.159.
20. Jules Deschênes, *Masters in their own House* (Ottawa: Canadian Judicial Council, 1981) at p.121.
21. R.S.C. 1985, c.27 (2nd Supp.), s.6.
22. Deschênes, at p.121.
23. See Peter Hogg, *Constitutional Law of Canada*, 3d ed., (Toronto: Carswell, 1992) at p.169, fn.38.
24. Russell, *The Judiciary in Canada*, at pp.84-5.
25. 28 U.S.C. 372(a).
26. *Ibid.*
27. *Ibid.* This provision was enacted by Congress in 1939. See Emily Van Tassel, "Why Judges Resign" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. II, (Washington: National Commission, 1993) 1137 at p.1190.
28. Note that in the past we made distinctions depending on length of service in the amount of disability pension. For example, at one time county court judges would get 1/3rd of their salary for a permanent disability if they had served less than 5 years, 2/3rds of their salary if they had served more than 5 years, and full salary if they had served 35 years: see An Act to amend the Act Respecting the Judges of Provincial Courts, Stat. Can. 1902, c.16, s.2; and An Act to amend the Supreme and Exchequer Courts Act, the Exchequer Court Act, and the Act respecting the Judges of Provincial Courts, Stat. Can. 1903, c.29, s.3.
29. 28 U.S.C. 372(b).
30. 28 U.S.C. 332(a)(1).
31. 28 U.S.C. 372(b).
32. *Ibid.*
33. The Administrative Office of the U.S. Courts has calculated that the involuntary disability provision has only been used in 6 instances since 1957 and in 9 instances since 1927. See W.K. Slate, "New Paradigms of Judicial Discipline: Application of Foreign Models in the American System" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. II, 1405 at pp.1407-1408; E.F. Van Tassel, "Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. II, 1137 at p.1192. For a discussion of state procedures, see J.M.

Shaman, S. Lubet and J.J. Alfini, *Judicial Conduct and Ethics* (Charlottesville, Va., Michie Co., 1990), chapter 15.

34. See, J.N. Barr & T.E. Willging, "Administration of the Federal Judicial Conduct and Disability Act of 1980", *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. I, 477 at pp.612-613; C.G. Geyh, "Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)", *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. I, 713 at pp.760-761.
35. 28 U.S.C. 372(b).
36. See V.L. Dilweg, "Proposed New Judicial Disciplinary and Enforcement Standards" (1993) 32 *Judges Journal* 32 at p.56.
37. *Ibid.*
38. Judges Act, R.S.C. 1985, c.J-1, s.65.
39. Crawford did not recommend any change be made to the present disability provision. *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits* (Crawford Commission) (Ottawa: Ministry of Supply and Services, 1993).
40. Section 12 of the Administration of Justice Act 1973, c.15, repealed and replaced by Supreme Court Act 1981, (U.K) 1981, c.54. See E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, 11th ed., (London: Longman, 1993) at p.378.
41. Supreme Court Act 1981, (U.K.) 1981, c.54, s.11.
42. Remarks of the Minister of Justice, Kim Campbell, to the Canadian Judicial Council, Ottawa, March 20, 1992. See, e.g., the resignation with a full pension of a judge of the Federal Court of Canada (P.C. 1991-2067, 24 October 1991) who was granted an absolute discharge when charged with committing an indecent act in a public place. His counsel argued at the court hearing that such a discharge would allow him to practise law: *Ottawa Citizen*, 4 March 1992.
43. *Ibid.*
44. Constitution Act, 1867, s.99(2).
45. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481, [1986] 2 S.C.R. 56.
46. *Valente* (1985) 23 C.C.C.(3d) 193, 24 D.L.R.(4th) 161, [1985] 2 S.C.R. 673.
47. *Ibid.* at p.198 C.C.C.

CHAPTER FOUR: FINANCIAL SECURITY

Chapter 4

1. *Valente* (1985) 23 C.C.C.(3d) 193 at 216, 24 D.L.R.(4th) 161, [1985] 2 S.C.R. 673.

Chapter 4

1. PAY

1. Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, No. 79 (N.Y.: New American Library, 1961; orig. pub. 1788) at p.472.
2. 1701, 12 and 13 William III, c.2.
3. Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.), reprinted in R.S.C. 1985, App.II.
4. U.S. Constitution, Art. III, s.1.
5. J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: U.T.P., 1985), at p.45.
6. Civil List Payments, 1832, 2 & 3 Wm. IV, c.116.
7. S. Shetreet, *Judges on Trial* (Amsterdam: North Holland, 1976), at p.33.
8. Judges' Remuneration Act, 1954, 2 & 3 Eliz. II, c.27, increasing the amount to £8,000 a year: see Shetreet, *Judges on Trial*, at p.33.
9. *House of Commons Debates*, 19 May 1883, at p.1312 *per* Mr. Casgrain.
10. See generally, Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p.149.
11. *Ibid.*
12. See the *Background Documents submitted by the Government of Canada to the 1992 Commission on Judges' Salaries and Benefits* (the Crawford Commission), Tab 1. In addition, every federally appointed judge in Canada receives an accountable allowance of \$2,500 for "reasonable" incidental expenditures: see Stat. Can. 1989, c.8, s.10, amending s.27 of the Judges Act. Further, federally appointed judges in some provinces (Ontario, Saskatchewan, and Alberta) receive an additional \$3,000 from the provinces for extra-judicial services. This is being phased out in Ontario and is not paid to supernumerary judges or to judges appointed after 1 January 1992: see Background Documents, Tab 1.
13. The C.B.A. report, *The Independence of the Judiciary* (Ottawa, 1985) was against a wide discrepancy, stating at p. 44: "The range of salaries of all Superior Court judges should be kept within relatively narrow limits."
14. In England, as of 1 April 1991, Lords of Appeal (equivalent to puisne judges of the S.C.C.) made \$200,577 (Canadian currency), Court of Appeal judges made \$192,305, and High Court judges made \$174,212. In the U.S., as of 1 January 1991, circuit court appeal judges made \$158,338 (Canadian currency) and district court trial judges made \$149,269. See Background Documents submitted by the Government of Canada to the Crawford Commission, Tab 2 at pp.4-7.
15. *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits* (the Crawford Commission) (Ottawa: Ministry of Supply and Services Canada, 1993) at p.11.
16. *Ibid.*, at p.12.

17. See, e.g., Stat. Can. 1919, c.59, s.13, amending R.S.C. 1906, c.138. Section 127(3) of the 1906 Act had stated that "The salaries and retiring allowances or annuities shall...be free and clear of all taxes and deductions whatsoever imposed under any Act of the Parliament of Canada."
18. *Judges v. A.G. of Saskatchewan* [1937] 2 D.L.R. 209 (P.C.).
19. *O'Malley v. Woodrough* 307 U.S. 277 (1939).
20. *Evans v. Gore* 253 U.S. 245 (1920).
21. *O'Malley v. Woodrough*, at p.282.
22. *Beauregard v. Canada* (1986) 30 D.L.R.(4th) 481, [1986] 2 S.C.R. 56, discussed in chapter 1.
23. Until 1978, it was thought that judges had R.R.S.P. contribution room of \$3,500, the same as other members of pension plans. However, in 1978, an anomalous Revenue Canada interpretation resulted in judges' having the maximum R.R.S.P. contribution room (of \$7,500, increasing annually thereafter). This higher R.R.S.P. contribution room was, of course, intended for those who would retire *without* pension plans. The government corrected this anomaly in 1992, when it passed s.8309(2) of the Income Tax Regulations limiting judges' R.R.S.P. contribution room to \$1,000 per year, the same as for other citizens. See Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 7 at pp.5-6.
24. Stat. Can. 1905, c.47, s.3 dealt with restricting judges to judicial duties: "No judge...shall...engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties."
25. There is no discussion of judicial salaries in other jurisdictions in the Crawford Report. However, as noted above, the federal government presented these figures in the Background Documents it submitted to the Crawford Commission.
26. Regular superior court judges in Canada make \$155,800 (1992 figures) while U.S. circuit court (appeal) judges make \$158,338 (Canadian) and district court (trial) judges make \$149,269 (as of 1 April 1991): Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tabs 1 & 2.
27. English county court judges make \$127,376 (Canadian equivalent) while district court judges make \$104,424. High Court judges make \$174,212 (as of 1 April 1991): Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 2.
28. As of 1 January 1995, according to the Department of Justice, there were 950 federally appointed judges in Canada: 780 full-time and 170 supernumerary judges.
29. Discussion with representatives of the Canadian Bar Association, Ontario Section, Spring, 1994. The figure may be slightly high, but not far out: see chapter 11 of this Report.
30. See the Judges Act, R.S.C. 1906, c.138. Differentials were not made, however, for individual judges in the same area. In 1876, the federal government had tried to individualize a number of judges' salaries on appointment, but after Edward Blake objected the proposal was dropped: *House of Commons Debates*, 2 March 1875, at pp.424-5. But it seems that in Ontario variable salaries for individual magistrates were used in the recent past: see John Hogarth, *Sentencing as a Human Process* (University of Toronto Press, 1971) at p.194.
31. See the Judges Act, R.S.C. 1985, c. J-1, s.27(2).

32. See, e.g., Saskatchewan, Report of the Provincial Court Commission (Saskatoon, 1993) at p.9.
33. Newfoundland is considering reclassification of the work of the provincial court judges as a technique for improving salaries: discussion with Newfoundland government officials, Spring, 1994. The provincial court judges in Newfoundland view this technique as illegitimate and have refused to participate: letter from Judge Owen Kennedy, Newfoundland (15 May 1995).
34. Emily Van Tassel, "Why Judges Resign: Influences on Federal Judicial Service, 1789-1992" in *Research Papers of the National Commission on Judicial Discipline and Removal* Vol. II, (Washington: National Commission, 1993) 1137 at p.1149.
35. See, e.g., Law Society of Upper Canada, Professional Conduct Handbook (as amended to 23 September 1994), Rule 15 "Retired Judges Returning to Practice".
36. There are only 14 civil servants in the DM-3 category and only 9 at or above the midpoint of the range as opposed to about 950 federal judges: figures supplied by Department of Justice, February, 1995; see also Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 3.
37. See, e.g., the Commissions of Inquiry for New Brunswick (1989, Wade MacLauchlan); for Prince Edward Island (1987, Wade MacLauchlan); Report of the Commission on Judges' Salaries and Benefits (1991, Douglas Schmeiser) and the Report of the Provincial Court Commission (Saskatoon, 1993) for Saskatchewan.
38. Stat. Can. 1981, c.50, s.12: see R.S.C. 1985, c. J-1, s.26(1).
39. *Ibid.*, s.26(2). There have been reports in 1983 (Lang), 1986 (Guthrie), 1989 (Courtois), and 1992 (Crawford).
40. See, e.g., the Manitoba Judicial Compensation Committee, and the Quebec Triennial Advisory Committee studying the Remuneration, the Pension Plan and other Social Benefits of the Members of the Court of Quebec.
41. *Ibid.*, s.26(1) states that the Minister must establish a commission "within six months after April 1, 1986 and within six months after April 1, in every third year thereafter".
42. Antonio Lamer C.J.C., "Report of the Chief Justice of Canada" (Address to the Canadian Bar Association Annual Meeting, 20 August 1994) in 1994 Year Book of C.B.A. (Ottawa: C.B.A., 1994) at p.10.
43. Allan Rock, Address (C.B.A. Annual Meeting, 23 August 1994).
44. New South Wales and the federal Australian judiciary: see P.H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at p.152; Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 3.
45. Constitution Act, 1867, as amended.
46. *Valente v. The Queen* (1985) 23 C.C.C. (3d) 193, 24 D.L.R.(4th) 161, [1985] 2 S.C.R. 673.
47. *Ibid.*, at p.218 C.C.C.
48. *Ibid.*, at p.217 C.C.C.

49. Alberta. See, e.g., *Campbell; Ekmecic; Wickman* [1995] 2 W.W.R. 469 (Alta. Q.B.) at pp. 539-558.
50. *Ibid.*
51. See the document on salaries as of April, 1994, prepared by the Ontario Attorney General's Department.
52. *Ibid.*
53. Provincial Court Act, R.S.P.E.I. 1988, c.P-25. See also, Commission of Inquiry Re: Salaries of Provincial Court Judges Province of P.E.I. (MacLauchlan Report) (1987) at p.60.
54. S.P.E.I. 1994, c.49, s.3(3).
55. See, e.g., *Report and Recommendations of the 1992 [Crawford] Commission on Judges' Salaries and Benefits* (Ottawa: Ministry of Supply and Services Canada, 1993) at p.11.
56. Judges Act, Stat. Can. 1981, c.50, s.12; R.S.C. 1985, c.J-1, s.25.
57. See the Crawford Commission Report, at p.10.
58. *House of Commons Debates*, (1 December 1980) at p.5206.
59. *Senate Debates* (11 March 1981) at p.1993.
60. *House of Commons Debates* (1 December 1980) at p.5207.
61. Courts of Justice Act, R.S.Q., c.T-16, ss.115 and 127; see also the Ontario Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.48, being s.25 of the Framework Agreement.
62. See *Campbell; Ekmecic; Wickman* [1995] 2 W.W.R. 469 (Alta. Q.B.); *Ref. Re: Remuneration of Judges of the Provincial Court of P.E.I.* (1994) unreported (P.E.I.C.A.); and several Saskatchewan cases. See, in particular, *The Queen v. Osachuk*, unreported, judgment by Hrabinsky J., 6 January 1995, granting mandamus to the Saskatchewan Provincial Court judges to hear cases (p.22): "The Provincial Court judges have a public duty and a legal duty to exercise their jurisdiction in the performance of their duties pending the outcome of their civil action."
63. *Provincial Court Judges Association (Manitoba) v. Manitoba (Minister of Justice)* (1994) 30 C.P.C. (3d) 1 (Man.Q.B.); *Judges of the Provincial Court of Sask. et al. v. Province of Saskatchewan* (Q.B., as yet untried), discussed in *Campbell; Ekmecic; Wickman* (Alta. Q.B.) *supra*; see also *Lawyers Weekly* 19 August 1994.
64. *Provincial Court Judges Association (Manitoba)*, *supra*.
65. *Judge of the Provincial Court of Manitoba v. Manitoba*, 25 April 1995, as yet unreported.
66. *Campbell; Ekmecic; Wickman*, *supra*.
67. *Ibid.*, at pp. 595 *et seq.*
68. *Ibid.*, at p.535; see also pp. 513-14.
69. Wayne Renke, "Invoking Independence: Judicial Independence as a No-Cut Wage Guarantee" *Points of View No. 5*, (U. of Alberta Centre for Constitutional Studies, 1995) at p. 19.

70. *Ibid.*
71. *Campbell; Ekmecic; Wickman*, at p. 517.
72. Notice of Appeal filed 2 December 1994.
73. *Ref Re: Remuneration of Provincial Court Judges* [1994] 2 P.E.I.R. B-49 (P.E.I.C.A.).
74. *Lowther* [1994] 2 P.E.I.R. D-206. (P.E.I.S.Ct., T.D.)
75. *Ref Re: Remuneration of Provincial Court Judges*, *supra*.
76. *Ibid.*
77. *Ibid.* See also, to the same effect, the decision of the appeal division from the *Lowther* decision, 6 April 1995, as yet unreported; *Charlottetown Guardian*, 8 April 1995.
78. *Avery* (1995) unreported (P.E.I. Prov.Ct.) at p.1; See also, N. Willis, "Judge rekindles wage-cut battle" in *Charlottetown Guardian*, 6 January 1995.
79. *Avery*, at p.3.
80. *Ibid.* at p. 10.
81. Eight-page Reference, dated 13 February 1995.
82. *Judges of the Provincial Court of Manitoba v. Manitoba*, 25 April 1995, at p. 23, as yet unreported.
83. *Ibid.*, at p. 27.
84. W.R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. Bar Rev.* 769 and 1139 at pp.789 *et seq*; Robert Stevens, *The Independence of the Judiciary* (Oxford: Clarendon Press, 1993), at pp.50-63; Wayne Renke, "Invoking Independence: Judicial Independence as a No-Cut Wage Guarantee"; R.F.V. Heuston, *Lives of the Lord Chancellors 1885-1940* (Oxford: Clarendon Press, 1964). Judicial salaries were reduced in 1832, but they were only partially retroactive: see 1832 Act, c.116, making it retroactive to the year 1828. It is sometimes argued that a 1760 English statute (1 Geo.III, c.23, s.III) provides that a judge's salary would not be decreased (see *United States v. Will* 449 U.S. 200 at p.218 (1980)), but as pointed out in chapter 1, section 2, of this Report the purpose of the statute was to ensure that judicial office continued after the demise of the Crown, and it was not relied on by the English judiciary in the 1930s.
85. National Economy Act 1931, 21 & 22 Geo. V, c.84.
86. Lederman, at p. 793.
87. Set out on p. 793 of Lederman.
88. Viscount Sankey to Lord Rankeillour, 6 March 1934, set out in Stevens, *The Independence of the Judiciary*, at p.62.
89. Stevens, at p.63.
90. *House of Commons Debates*, Vol. I, (26 February 1932) at p.572 *per* Mr. M.N. Campbell; (4 March 1932) at pp.829-37 *per* Mr. Sanderson, Mr. Guthrie, Mr. Cahan, and Mr. Power.
91. *House of Commons Debates*, Vol.I, (26 February 1932) at p.562.

92. An Act to amend the Income War Tax Act, Stat. Can. 1934, c.19, s.1, adding s.9B(1). See Lederman at p.1164, who stated: "It looks as if the special taxing statute of 1932, as a taxing statute, was ultra vires the federal Parliament. A general income tax of ten percent on all public salaries might have been valid to effect the total object, including the judicial salaries."
93. See e.g., Lederman at p. 1164; Peter Hogg, *Constitutional Law in Canada*, 3rd ed., (Toronto: Carswell, 1992) at s.7.1(b); Renke, at p. 16.
94. See *Toronto Star*, 14 July 1993.
95. Lederman, at pp.793-5.
96. *Ibid.*, at p.795.
97. *Ibid.*, at p.796.
98. Hogg, at s.7.1(b): in footnote 23, Hogg states that "the better view is that [section 100 of the Constitution Act] does not prohibit a reduction in judicial salaries".
99. Lederman, at p.795.
100. *Ref Re: Remuneration of Judges of the Provincial Court of P.E.I.*
101. See Judges Act, R.S.C. 1985, c.J-1, s.25.
102. See "Salary freeze may be illegal judiciary says" *Toronto Star* (7 January 1993).
103. See Canadian Judicial Council, *Annual Report 1993-94* at p.31.
104. He is quoted as stating: "Nothing less than the independence of the judiciary is at stake...If I had been consulted by the Prime Minister, I would have responded that a freeze of judges' salaries is something which in the interest of the country the judges of Canada should accept." See D. Vienneau, "Top justice blasts imposed pay cap" *Toronto Star* (22 February, 1993); "Paying for justice" *Globe and Mail* (5 May, 1994).
105. Yves Fortier, legal counsel for the Canadian Judges Council and Canadian Judges Conference, stated at the Crawford Commission hearings, "The judges of Canada do not waive their right in another forum at the appropriate time to attack the constitutionality of the decision." See "Salary freeze may be illegal judiciary says" *Toronto Star* (7 January 1993); *Law Times* (18 January 1993).
106. *Campbell; Ekmecic; Wickman*, at p. 517.
107. U.S. Constitution, Art. III, s.1.
108. See *U.S. v. Will* 449 U.S. 200 (1980); *Atkins v. U.S.* 556 F.2d 1026 (Ct.Cl.1977), cert. denied 434 U.S. 1009 (1978).
109. Universal Declaration of the Independence of the Judiciary quoted in *Beauregard v. Canada* (1986) 30 D.L.R.(4th) 481, at p. 495, [1986] 2 S.C.R. 56.
110. *Ibid.*
111. See Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 48, adding appendix A of Framework Agreement Between the Management Board ("the Minister") and the Provincial Court Judges ("the judges").

112. The Commission was established on 16 July 1993 by Justice Minister Robert Mitchell under s.5 of the Provincial Court Amendment Act, 1993, S.S. 1993, c.60 pursuant to agreement. Repealed by Bill 46, Provincial Court Amendment Act, 1994, 4th Sess., 22nd Leg., Sask., 1994.
113. See, *Report of the Provincial Court Commission* (Saskatoon, 1993) at p.1.
114. Provincial Court Act, S.S. 1993, c.60, s.5(11).
115. *Report of the Provincial Court Commission*, at p.1.
116. *Ibid.*, at p.11.
117. *Ibid.*, at pp.10-11.
118. See, C. Schmitz, "CBA urges Saskatchewan gov't to withdraw Bill that would abolish provincial commission" *Lawyers' Weekly* (6 May 1994), discussing Bill 46, Provincial Court Amendment Act, 1994, 4th Sess., 22nd Leg., Sask., 1994.
119. See "Saskatchewan judges sue for pay" *Globe and Mail* (19 May 1994); "Sask. judges suing province" *Lawyers' Weekly* (3 June 1994).
120. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.48, being s.15 of the Framework Agreement.
121. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.48.
122. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.48, being s.27 of the Framework Agreement.
123. Courts of Justice Statute Law Amendment Act, S.O. 1994, c.12, s.48, being s.32 of the Framework Agreement.
124. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c.12, s.48, being s.25 of the Framework Agreement.
125. Crawford Commission, at p.8.
126. See P.H. Russell, *The Judiciary in Canada* at p.52; Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 2 at pp.9-10.
127. Bill 49, An Act to Amend the Provincial Court Act, 3rd Sess., 35th Leg., B.C., 1994. The approach was recommended for New Brunswick by the 1989 Commission of Inquiry Re Salaries of Provincial Court Judges (Wade MacLauchlan, Chair) at pp.10-11, in which the procedure is referred to as a legislative "escape hatch".
128. Bill 49, ss.9 and 10.
129. "AJS Model Statute to Establish a Judicial Compensation Commission" (1994) 78 *Judicature* 9 at p.11.
130. *Ibid.*
131. Washington Citizens' Commission on Salaries for Elected Officials, Wash. Constit. Amend. No.78.

132. M.M. Franzen, "Judicial Pay in State Moves to What Some see as 'Fair level' ", *Washington Journal* (19 October 1992).
133. *Report and Recommendations of 1983 Commission on Judges' Salaries and Benefits* (Otto Lang, chair) (Ottawa: Ministry of Supply and Services, 1983) at p.14.
134. Constitution Act, 1867, as amended.
135. Opinion dated 8 August 1989 given to the Joint Benefits Committee of the Canadian Judicial Council and the Canadian Judges Conference.
136. Judges Act, R.S.C. 1985, c. J-1, s.25(1).
137. Section 54 provides: "It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed."
138. P.H. Russell, *The Judiciary in Canada*, at p.152.
139. Russell, at p.152. Peter Hogg has his doubts about the constitutionality of this procedure, stating in the above opinion that "Even an 'affirmative resolution' procedure would probably not satisfy s.100." In his view the objection to the affirmative resolution procedure is not as strong as to the negative resolution process.
140. Crawford Commission at pp.7-8.
141. The Commission was established under Federal Salary Act, 1967, 5 U.S.C. 351. See Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, Tab 2 at p.5.
142. *Ibid.*
143. 2 U.S. 359 and 360.
144. Under the Parliament of Canada Act, R.S.C. 1985, c.P-1, s.68(1), a commission must be established within two months of the "return of the writs at each general election."
145. See the *Sixteenth Report on Senior Salaries* (Sir David Nickson, Chair), February, 1994. See also Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, Tab 2 at p.7.
146. Background Documents submitted by the Government of Canada to the 1992 Crawford Commission, Tab 2 at p.7.
147. *Ibid.*
148. Supreme Court Act, Stat. Can. 1875, c.11, s.8.
149. Report and Recommendations of the 1992 Crawford Commission on Judges' Salaries and Benefits (Ottawa: Ministry of Supply and Services Canada, 1993), at Tab 3.
150. Background Documents submitted by the Government of Canada to the 1992 Crawford Commission on Judges' Salaries and Benefits, at Tab 2.

151. *Ibid.*; see also Remuneration Tribunal Act 1973, Commonwealth of Australia, No. 215 of 1973, s.7.

Chapter 4

2. PENSIONS

1. Constitution Act, 1867, as amended.
2. Stat. Can. 1903, c.29, s.1. For a discussion of remuneration and pensions of Supreme Court of Canada judges during this period, see J.G. Snell and F. Vaughan, *The Supreme Court of Canada* (U. of Toronto Press, 1985) at pp.54-57 and 65.
3. See Stat. Can. 1920, c.56, s.13; and for Supreme Court of Canada judges, see Stat. Can. 1930, c.27, s.1.
4. *House of Commons Debates*, Vol. IV, (5 August 1903), at p. 8090.
5. These calculations were done at my request by L.M. Cornelis of the Office of the Superintendent of Financial Institutions Canada: letters dated July 28 and August 22, 1994. The interest rate assumption on contributions was the effective annual rate on a Government of Canada zero-coupon bond maturing in mid-1994. Interest rates for the future were based on a net discount rate of 4.75% per annum. Mr. Cornelis writes: "I used a net discount rate (NDR) that was conceptually the excess of an implicit interest rate over an implicit indexation rate. The assumed NDR for the first 15 years was 4.75% per annum, based on the market yields available on real-return bonds as at the 28 July 1994 quotation date". Fully-indexed annuities have not normally been commercially offered, but Mr. Cornelis states: "Now that real-return bonds are available in the marketplace, it might be possible to find an insurer to quote on a judge's fully-indexed pension; if so, I would expect the cost to be reasonably close to the relevant actuarial present value." Stephen Borins J. sent me (letter dated 14 September 1994) his calculations on the present value of contributions to a judge's pension plan and they generally agree with Mr. Cornelis' figures.
6. 28 U.S.C. 371(a).
7. R.S.C. 1985, c.J-1.
8. *Ibid.*, s.42(1)(a).
9. *Ibid.*, s.42(1).
10. See *Report and Recommendations of the 1992 [Crawford] Commission on Judges Salaries and Benefits*. (Ottawa: Ministry of Supply and Services Canada, 1993) at p.18.
11. Judges Act, R.S.C. 1970, c.159, s.23(1)(a).
12. An Act to amend the Judges Act, S.C. 1970-71-72, c.16 (2nd Supp.), s.6.
13. An Act respecting the Governor General, the Civil List, and the Salaries of certain Public Functionaries, Stat. Can. 1868, c.33.
14. *Ibid.*, s.3.
15. *Ibid.*
16. See chapter 5, section 5, Superior Court judges.

17. Stat. Can. 1874, c.4, s.8; Stat. Can. 1882, c.12, s.6.
18. See, e.g., R.S.C. 1886, c.138, ss. 14 & 15; R.S.C. 1906, ss. 19 & 24.
19. Stat. Can. 1903, c.29.
20. *Ibid.*, s.1.
21. *Ibid.*
22. Stat. Can. 1919, c.59, s.11.
23. Mr. Proulx, *House of Commons Debates*, Vol. V, (28 June 1919), at p. 4227.
24. Stat. Can. 1920, c.56, s.13.
25. Stat. Can. 1960, c.46, s.3, amending s.23 of R.S.C. 1952, c.159.
26. R.S.C. 1927, c.105, s.23; R.S.C. 1952, c.159, s.23.
27. *Ibid.*, s.25.
28. In the past, it was higher: Stat. Can. 1930, c.27, s.1(3); see R.S.C. 1952, c.159, s.24(2), where the wording is "an annuity not exceeding three-fourths of the salary annexed to the office held by him at the time he ceases to hold office."
29. Stat. Can. 1946, c.56, ss. 22-28.
30. R.S.C. 1927, c.105, s.23.
31. Stat. Can. 1946, c.56, s.22; R.S.C. 1952, c.159, s.23.
32. Stat. Can. 1946, c.56, s.26(2); but Stat. Can. 1981, c.50, s.18(3), however, provided that "widow" includes widower.
33. *Ibid.*
34. Stat. Can. 1960, c.46, s.3, amending s.23 of R.S.C. 1952, c.159.
35. Stat. Can. 1971, c.55, s.7. There was still a discretion to grant a pension at an earlier age if the resignation was "conducive to the better administration of justice or...in the national interest."
36. Stat. Can. 1981, c.50, s.16, amending R.S.C. 1970, c.J-1, s.23.
37. *Ibid.*
38. Judges Act, R.S.C. 1985, c.J-1, s.42(1).
39. Judges Act, R.S.C. 1970, c.159, s.23(1).
40. *Landreville v. The Queen (No. 3)* (1980) 111 D.L.R. (3d) 36 (F.C.T.D.).
41. *Ibid.*, at p.61.
42. Stat. Can. 1981, c.50, s.16, amending R.S.C. 1970, c.J-1, s.23.
43. Judges Act, R.S.C. 1985, c.J-1, s.42(1)(d).
44. *Ibid.*, s.42(2).

45. *Ibid.*, s.42(1)(b).
46. *Ibid.*, s.42(1)(c).
47. See, e.g., Brief of the Joint Committee on Judicial Benefits of the Canadian Judicial Council and the Canadian Judges Conference to the 1992 Crawford Commission on Judges' Salaries and Benefits, at pp.35-38. A survey by William M. Mercer Ltd. was commissioned by the Canadian Judges Conference: see "Survey of Judges on the Subject of Judges' Annuities", 26 March 1992. Support for the rule of 80 was strong; amongst the judges not yet eligible for such a pension, 86% were in favour; but of the judges who had achieved supernumerary status, only 58% were in favour.
48. See Crawford Commission, at p.42.
49. See, e.g., Brief of the Joint Committee on Judicial Benefits to the Crawford Commission, at pp.35-38.
50. See Crawford Commission, at p.21.
51. 28 U.S.C. 371(c); *Report of the National Commission on Judicial Discipline and Removal* (Washington: National Commission, 1993), at pp.114-5, and 189.
52. *Ibid.*
53. Brief of the Joint Committee on Judicial Benefits to the Crawford Commission, at p.36.
54. D.M. McGill, "Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol.II (Washington: National Commission, 1993), 1221 at p.1254.
55. See Canadian Judicial Council, *Annual Report 1993-94*, at pp.8-9.
56. Judicial Pensions and Retirement Act 1993, (U.K.), 1993, c.8, s.2. It is based on a twenty-year accrual period. The Act was brought into effect 31 March 1995.
57. Saskatchewan, for example, has a normal retirement age of 65, with pension eligibility after 10 years. A judge may take early retirement at age 55 or older, if he has served for a minimum of 10 years. However, his pension is reduced by approximately 6% for each year he retires earlier than normal retirement. See Province of Saskatchewan, *Report of the Commission on Judges' Salaries and Benefits* (Schmeiser Report) (Saskatchewan: 1991) at pp.17-19.
58. Salaries and Benefits of Provincial Judges, O.Reg. 67/92, s.8, as amended by O.Reg. 460/93. See also Ontario Court of Justice, Provincial Division, *A Guide to Benefits* (1993).
59. Judges Act, R.S.C. 1985, c.J-1, s.51(1).
60. See Crawford Commission, at p.19.
61. *Report of the National Commission on Judicial Discipline and Removal*, 1993, at p.116.
62. *Ibid.*
63. *Ibid.*, at p.114.
64. The U.K. Judicial Pensions and Retirement Act 1993, s.2(4) provides for an actuarially reduced pension at any age if the judge is removed from office.

65. Crawford Commission, at p.22.
66. *Ibid.*
67. Brief of the Joint Committee on Judicial Benefits to the Crawford Commission, at pp.35-38.
68. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481, [1986] 2 S.C.R. 56 at 76.
69. See Crawford Commission, at p.19.
70. *Ibid.*, at p.15.
71. See Provincial Court Act, R.S.P.E.I. 1988, c.P-25, s.8(1)(b); Provincial Court Act, R.S.N.B. 1973, c.P-21, s.15.
72. See Provincial Court Act, 1991, R.S.N. 1991, c.15, s.12.
73. See Courts of Justice Act, R.S.Q., c.T-16, s.230.
74. See Provincial Court Act, R.S.P.E.I. 1988, c.P-25, s.8(3).
75. See Judicial Pensions and Retirement Act 1993, (U.K.), 1993, c.8.
76. *Ibid.*, s. 3(1).
77. *Ibid.*, s. 2.
78. The 1992 "Survey of Judges on the Subject of Judges Annuities", prepared by W. Mercer for the Canadian Judges Conference, found that approximately 84% of the judges who responded had one or more R.R.S.P.'s (p.7).
79. *House of Lords Debates* (16 June 1992) at p.119.
80. The Income Tax Act permits a maximum tax-sheltered pension accrual of \$1,722 per year.
81. See, e.g., Lord Mishcon, *House of Lords Debates* (16 June 1992), at pp.124-6; Lord Taylor, *House of Lords Debates* (16 June 1992), at pp.141-4; Mr. Taylor, *House of Commons Debates* (3 December 1992), at pp.425-9; Sir Ivan Lawrence, *House of Commons Debates* (3 December 1992), at pp.463-4.

Chapter 4

3. CONCLUSION

1. (1985) 23 C.C.C. (3d) 193 at p.208, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
2. *Graton v. Canada (Judicial Council)* (1994) 115 D.L.R.(4th) 81, [1994] FCJ 10, (F.C.T.D.).

CHAPTER FIVE: DISCIPLINE

Chapter 5

1. JOINT ADDRESS

1. *Constitution Act*, 1867, 30 & 31 Victoria, c. 3 (U.K.) [R.S.C., 1985, Appendix II], s. 99(1). See also *Gratton v. Canada (Judicial Council)* (1994) 115 D.L.R. (4th) 81 (F.C.T.D.) at p. 92, [1994] 2 F.C. 769. Note that until 1971 the Cabinet could, in effect, remove a disabled judge: see the earlier section on disability.
2. *Decision of the Inquiry Committee Under Subsections 63(2) and 63(3) of the Judges Act in Relation to Mr. Justice F.L. Gratton of the Ontario Court of Justice* (General Division) (February, 1994) at p. 30; *Gratton v. C.J.C.*, at p. 95 D.L.R.; W.R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. B. Rev.* 769 at p. 787.
3. *Gratton v. Canadian (Judicial Council)*, at p. 92 D.L.R..
4. P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 179.
5. See Shimon Shetreet, *Judges on Trial* (Amsterdam: North-Holland, 1976) at pp. 143-44.
6. R. MacGregor Dawson, *The Government of Canada*, 2nd ed., (University of Toronto Press, 1954), and *The Principle of Official Independence* (London: P.S. King & Son, 1922).
7. Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart, 1974).
8. Alpheus Todd, *Parliamentary Government in England* (London: Longmans, Green, 1889).
9. Hansard, *Debates of the Senate* (8 June 1967) at p. 139.
10. *Canadian Judicial Council Inquiry Committee Pursuant to Subsection 63(3) of the Judges Act Re: The Honourable Mr. Justice F.L. Gratton* (11 July 1994) at p. 665.
11. E.g., in the *Landreville* case, discussed below, the Honourable Senator Daniel Lang gave notice of a motion for Address to the Governor General on 6 June 1967. The proposed motion was read into the record and was to be moved on 8 June 1967; Landreville resigned before the motion was actually moved and his letter of resignation was read into the record on 8 June 1967. See *Debates of the Senate* (6 June 1967) at p. 103.
12. E.g., a petition was prepared by H.J. Clarke, a former Manitoba Attorney General, and several other members of the Manitoba bar, against Manitoba Chief Justice Edmund Burke Wood (see discussion below). On the basis of this petition, which was presented to the House of Commons by Joseph Royal in March 1881, a motion for the appointment of a select committee to investigate the allegations was put forward by the government. See Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis, 1972) at pp. 113-39, for a full discussion of the life of Chief Justice Wood.
13. *Valente v. The Queen* (1985) 23 C.C.C. (3d) 193 at 211-12, [1985] 2 S.C.R. 673. The Court stated that as an essential of security of tenure for the purposes of s. 11(d) of the Charter, "the judge should be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge is afforded a full opportunity to be heard."

14. Judges Act, R.S.C. 1985, c. J-1, s. 71. See also *Valente*, at 211, where the Court stated: "Whether or not the executive should be bound by the report of the judicial inquiry—that is, whether the power to remove should be conditional upon a finding of cause by the judicial inquiry, as is now provided by s. 56(1) of the *Courts of Justice Act*, 1984—I find more difficult. Certainly, it is preferable, but I do not think it can be required as essential to security of tenure for purposes of s. 11(d)." And see Russell, at p. 180.
15. *House of Commons Debates* (13 May 1868) at p. 685; see also, Russell, at p. 179.
16. See Russell, at p. 195, note 26.
17. Paula Abrams, "Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers," (1991) 41 *DePaul Law J.* 59 at p. 77.
18. The Senate's use of a trial committee in order to make the impeachment process less cumbersome was challenged by former federal judge—Walter L. Nixon. Writing for the Supreme Court, Chief Justice William Rehnquist stated that the Senate's procedural determinations are not subject to review by the courts if the Senate fulfils its constitutional requirements, i.e., a two-thirds vote and being on oath or affirmation. See: *Nixon v. United States* 113 S.Ct. 732 (1993) and *Report of the National Commission on Judicial Discipline and Removal* (Washington: August, 1993) at pp. 52-53.
19. *Nixon v. United States*, *supra*.
20. *Valente*, at pp. 211-12; *Universal Declaration on the Independence of Justice*, Montreal, 1983, s. 2.33; the World Conference on the Independence of Justice in 1983 insisted upon a judicial inquiry as a pre-condition to removal, but did not find that judicial independence required a role for the legislature: see Russell, at pp. 180-81.
21. Dawson, *The Government of Canada*, at p. 440; Forsey, at p. 151.

Chapter 5

2. GROUNDS FOR REMOVAL

1. See Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992); Shimon Shetreet, *Judges on Trial* (Amsterdam: North-Holland, 1976); P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987); and W.R. Lederman, "The Independence of the Judiciary" (1956) 34 *Can. B. Rev.* 769.
2. See *Gratton v. Canada (Judicial Council)* (1994) 115 D.L.R. (4th) 81 (F.C.T.D.) at pp. 91-2, [1994] 2 F.C. 769.
3. Judges Act, R.S.C. 1985, c. J-1, s. 65(2)(a).
4. *Gratton v. Canada (Judicial Council)*, at p. 85 D.L.R..
5. *Canadian Judicial Council Inquiry Committee Pursuant to Subsection 63(3) of the Judges Act Re: The Honourable Mr. Justice F.L. Gratton* (11 July 1994) at pp. 672-74.
6. Judges Act, R.S.C. 1985, c. J-1, s. 63(3) allows the Judicial Council to designate the membership of an Inquiry Committee, including "one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee." By Art. VII, s. 8.06(a) of the Canadian Judicial Council By-laws, "the Chairman of the Judicial Conduct Committee shall

designate up to five members of the Canadian Judicial Council (other than those who served on the Panel) to be available to serve on any subsequent Inquiry Committee which might be established pursuant to the Act.” See Canadian Judicial Council, *Annual Report 1992-1993*, (Ottawa: Canadian Judicial Council, 1993) at p. 35.

7. Judges Act, R.S.C. 1985, c. J-1, s. 65(2).
8. See, e.g., Russell, at p. 176; and Shetreet, at p. 274.
9. *Decision of the Inquiry Committee Under Subsections 63(2) and 63(3) of the Judges Act in Relation to Mr. Justice F.L. Gratton of the Ontario Court of Justice (General Division)* (February, 1994) at p. 31. The sentence before this gave the impression, when read by itself, that there were no limitations. It stated: “It [s.99] also authorizes Parliament to conduct proceedings for the removal of superior court judges without specifying the possible grounds for removal.” This was clearly not what the Committee intended.
10. *Gratton Inquiry Decision* (February, 1994), at p. 31.
11. *Ibid.*, at p. 38.
12. *Gratton v. Canada (Judicial Council)*, at p. 98 D.L.R.
13. *Gratton Inquiry Decision* (February, 1994), at pp. 37-38.
14. *Gratton v. Canada (Judicial Council)*, at p. 100 D.L.R.
15. *Gratton v. Canada (Judicial Council)*, at p. 100 D.L.R.
16. *C.J.C. Inquiry* (11 July 1994), at pp. 676-77.
17. Russell, at p. 176.
18. Jules Deschênes, *Masters in their Own House*, (Ottawa: Canadian Judicial Council, 1981) at p. 116.
19. *Report of the National Commission on Judicial Discipline & Removal* (Washington, 1993) at p. 73.
20. Sir William R. Anson, *The Law and Custom of the Constitution*, 3rd ed., Vol.II, Part I (Oxford: Clarendon Press, 1907) at p. 222; see also Shetreet, at p. 278.
21. *Inquiry Re: The Hon. Mr. Justice Leo A. Landreville* (Ottawa: Queen’s Printer, 1966)(Commissioner: The Hon. I.C. Rand) at p. 97. Will it include incompetence? Shetreet argues that it should not: see Shimon Shetreet, “The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986” (1987) 10 *U.N.S.W.L.J.* 4 at pp. 14-15.
22. *Report to the Canadian Judicial Council of the Inquiry Committee Members* (The Donald Marshall Jr. Affair) (1991) 40 *U.N.B.L.J.* 210 at p. 219.
23. Ruling by Chief Justice Culliton as chair of the C.J.C. Judicial Conduct Committee.
24. Cf. Russell, at p. 177: “its actions in this area are not reviewable by the courts.”

Chapter 5

3. REMOVAL OF COUNTY COURT JUDGES

1. An Act Respecting County Court Judges, Stat. Can. 1882, c. 12.
2. R. MacGregor Dawson, *The Principle of Official Independence* (London: P. S. King, 1922) at p. 39.
3. Dawson, at p. 41.
4. Judges Act, R.S.C. 1985 (3rd Supp.), c. 16, s. 1.
5. An Act Respecting County Court Judges, Stat. Can. 1882, c. 12, s. 2; Judges Act, R.S.C. 1985 c. J-1, s. 7.
6. An Act Respecting County Court Judges, S.C. 1882, c. 12, s. 3.
7. Judges Act, R.S.C. 1952, c. 159, s. 32.
8. Judges Act, S.C. 1970-71, c. 55, s.32(1).
9. See Dawson, at p. 42.
10. Dawson, at pp. 41-42.
11. Dawson, at p. 42.
12. Set out in Gerald L. Gall, *The Canadian Legal System*, 2d ed. (Calgary: Carswell, 1983) at pp. 231-32.
13. Gall credits Mr. Justice Alan R. Philp for bringing this case to his attention in a paper entitled "Judicial Conduct: Independence and Integrity — Discipline and Removal", prepared for the County and District Court Annual Seminar, 1977: see Gall, at p. 231, note 76.
14. *House of Commons Journals* (13 March 1929) at p. 159.
15. *House of Commons Journals* (26 January 1934) at p. 18.
16. *House of Commons Debates* (8 November 1932) at p. 924.
17. Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis, 1972) at pp. 258-65.
18. As quoted in Gibson, at p. 262.
19. *Ibid.*, at p. 262.
20. Gibson, at p. 264.

Chapter 5

4. SUPERIOR COURT JUDGES

1. J. Murray Beck, "Sir William Young" in *Dictionary of Canadian Biography*, Vol. XI (University of Toronto Press, 1982) at p. 943.

2. See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 179; *House of Commons Journals* (20 November 1867) at p. 26; and *House of Commons Debates* (12 May 1868) at p. 675.
3. *House of Commons Journals* (7 May 1868) at p. 297; and *House of Commons Journals* (18 May 1868) at p. 400. See also Gerald L. Gall, *The Canadian Legal System*, 2nd ed. (Calgary: Carswell, 1983) at p. 231; and Russell, at p. 179.
4. *House of Commons Debates* (12 May 1868) at p. 675.
5. *House of Commons Debates* (13 May 1868) at p. 685.
6. *Ibid.*, at pp. 685-86.
7. The report was not printed: see Gall, at p. 231.
8. This report was not printed; see Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart, 1974) at p. 149.
9. See Pierre-Louis LaPointe, "Levi Ruggles Church" in *Dictionary of Canadian Biography*, Vol. XII, (University of Toronto Press, 1990) at p. 197.
10. *Ibid.* There was a complex set of issues surrounding this controversy involving, *inter alia*, the control of the administration of the law in Hull Township.
11. See Forsey, at pp. 149-50; Russell, at p. 179; and *House of Commons Debates* (19 February 1878) at pp. 369-72. This incident is not mentioned in Loranger's biography: See Jean-Charles Benefant, "Thomas-Jean-Jacques Loranger" in *Dictionary of Canadian Biography*, Vol. XI (University of Toronto Press, 1982) at p. 529.
12. J. Daniel Livermore, "Edmund Burke Wood" in *Dictionary of Canadian Biography*, Vol. XI (University of Toronto Press, 1982) at p. 935.
13. *Ibid.*
14. See Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Peguis, 1972) at pp. 113-139.

Chapter 5

5. LANDREVILLE

1. Professor Kaplan has read the following material and I have incorporated a number of his suggestions.
2. Unless otherwise noted, the chronology has been taken from Collier J.'s Federal Court judgment in *Landreville v. The Queen* (No. 2) (1977) 75 D.L.R. (3d) 380 (F.C.T.D.) and Professor Kaplan's comments on my draft.
3. *Ibid.*, at p. 385.
4. *Ibid.*, at p. 386.
5. *Ibid.*, at p. 390.
6. *Ibid.*, at p. 391.
7. *Inquiry Re: The Honourable L.A. Landreville* (Ottawa: Queen's Printer, 1966).

8. *Ibid.*, at pp. 107-8.
9. *Ibid.*, at p. 108.
10. *Landreville v. The Queen* (No. 2) (1977), at p. 382.
11. P. H. Russell, *The Judiciary in Canada : The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 194, note 16; see also *House of Commons Debates* (31 May 1967) at pp. 788-89.
12. *House of Commons Debates* (8 June 1967) at p. 1281.
13. *Ibid.*
14. Russell, *The Judiciary in Canada*, at p. 179.

Chapter 5

6. CREATION OF THE CANADIAN JUDICIAL COUNCIL

1. Judges Act, Stat. Can. 1970-71, c. 55, s. 11.
2. Chief Justice Edward M. Culliton, Address (Law Society and Government of Saskatchewan Dinner in Honour of Chief Justice Culliton, 20 March 1981) (unpublished) at pp. 19-20. See also the University of Toronto transcript of the oral history given by John Edwards, 15 October 1987, on deposit at the University of Toronto Archives.
3. *House of Commons Debates* (6 November 1969) at p. 615.
4. *House of Commons Debates* (14 June 1971) at p. 6666.
5. *House of Commons Debates* (6 November 1969) at pp. 614-15.
6. *House of Commons Debates* (14 June 1971) at p. 6666.
7. Christine J.N. Kates (Interviewer), *Interviews with Chief Justice Wilbur Jockett* (July 1991) at p. 91.
8. *House of Commons Debates* (14 June 1971) at p. 6666.
9. See, e.g., *House of Commons Debates* (14 June 1971) at p. 6673, where N.D.P. member of Parliament, John Gilbert, states: "The establishment of the Canadian Judicial Council is probably the important part of the bill, and it is a step in the right direction when we cast our minds back to the period when it took such a long time to determine whether a judge should be ousted from the bench." See also, *House of Commons Debates* (14 June 1971) at p. 6682; and Proceedings of the Standing Committee on Justice and Legal Affairs, 16 June 1971, at pp. 25-6. Landreville was briefly mentioned in the Senate during discussion about the creation of the C.J.C.: *Senate Debates* (29 September 1971) at p. 1278 per Lionel Choquette, and at p. 1279 per Daniel Lang.
10. P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 179-80.
11. *Interviews with Chief Justice Wilbur Jockett*, at p. 90.

12. Christine J.N. Kates (Interviewer), *An Interview with the Right Honourable John Turner* (June 1992) at p. 2. Further evidence to support this view is a letter from Prime Minister Lester Pearson's parliamentary secretary, John Matheson who wrote to Pearson in October, 1967 with the suggestion, apparently emanating from professor William Lederman, that the judges should conduct an investigation. Matheson wrote that if this was done, "hereafter allegations of misconduct against any Superior Court Judge will be first fully investigated by a Commission of other Superior Court Judges who will conduct a fair hearing. Such Commission should ascertain the facts and report them and also make a finding whether in their opinion the misconduct has been proven to their satisfaction. They could then recommend removal if they did find the necessary misconduct. Upon such recommendation the Cabinet would accept the recommendation, introduce the motion for removal and stand behind it in Parliament as a Government measure." See Pearson Papers, MG 26, N4, Vol. 136, File No. 345, Landreville, Matheson to Pearson, 23 October 1967, as cited in William Kaplan, *Bad Judgment: The Case of Mr. Justice Leo A. Landreville*, forthcoming. See also the *Globe and Mail* 31 March 1967.
13. See Canadian Judicial Council, *Annual Report 1987-1988* (Ottawa: Canadian Judicial Council, 1988) at p. 7; see the confidential internal C.J.C. memo on the closed files of the Council (29 November 1990) (re file CD-136) at p. 4.
14. *House of Commons Debates* (14 June 1971) at p. 6666.
15. *Ibid.*
16. Commissioner for Federal Judicial Affairs, *Judicial Appointments: Information Guide* (Ottawa: Supply & Services Canada, 1988) at p. 4.
17. *House of Commons Debates* (24 September 1971) at p. 8166.
18. *Interviews with Chief Justice Wilbur J. Jetté*, at p. 109.
19. Internal C.J.C. memo (29 November 1990) (re files 1003 and 1059) at p. 5.
20. Letter from Andrew Watt, Department of Justice, Canada, to M.L. Friedland (4 August 1994).
21. Department of Justice, News Release, "Judges Act Bill" (28 April 1971).
22. Department of Justice, "Canadian Judicial Council Historical Background", undated.
23. *Report of the Royal Commission Inquiry into Civil Rights* (McRuer Report) No. 1, Vol. 2 (Toronto: Queen's Printer, 1968).
24. *Report of the Royal Commission Inquiry into Civil Rights* (McRuer Report), No. 2, Vol. 4 (Toronto: Queen's Printer, 1969) at p. 1400.
25. *Ibid.*, at p. 1401.
26. *Ibid.*
27. *Ibid.*
28. The key judicial players in setting up the Council, according to the Canadian Judicial Council oral interviews I read, were Chief Justices Culliton, Gale, and Jetté.
29. *House of Commons Debates* (24 September 1971) at p. 8170.
30. *Interview with John Turner*, *supra*, at p. 46.

31. Law Reform Commission Act, R.S.C. 1970 (1st Supp.), c. 23.
32. Federal Court Act, R.S.C. 1970 (2d Supp.), c. 10.
33. See generally, Dieter Hoehne, *Legal Aid in Canada* (Lewiston, N.Y.: Edwin Mellen Press, 1989).

Chapter 5

7. CANADIAN JUDICIAL COUNCIL PROCEDURES

1. The historical material is drawn from a confidential Canadian Judicial Council internal memo in 1990 reviewing all complaints from 1971 until the end of 1989. Chief Justice Wilbur Jaccett of the Federal Court of Canada drafted the by-laws under which the Council operated.
2. File 1047. The Chief Justice of Saskatchewan, E.M. Culliton, was the chair of the Committee from its inception in 1972 until his retirement in 1981. Chief Justice Gregory Evans of Ontario then chaired the Committee until 1985, followed by joint chairs of Chief Justice Nemetz of British Columbia and Chief Justice Crête of Quebec, the latter of whom chaired the Committee until his death in 1988, when Chief Justice Richard of New Brunswick became the chair. As stated in the text, Chief Justice Clarke of Nova Scotia became the interim chair from December 1993 to February 1994, and Chief Justice McEachern has been the chair from February 1994.
3. For a description of the procedures just before the change in the by-laws, see A. Wayne MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard?" (1993) 3 *N.J.C.L.* 159 at pp. 193-96.
4. See Article VIII of Canadian Judicial Council By-laws. The by-laws are set out in the Canadian Judicial Council, *Annual Report 1993-1994* (Ottawa: Canadian Judicial Council, 1994) at pp. 44-48.
5. Art. VIII, s. 8.10 of the Canadian Judicial Council By-laws states: "The Chairman of the Canadian Judicial Council and the Chief Justice and Associate Chief Justice of the Federal Court of Canada shall not participate in the consideration of any aspect of a complaint in any capacity unless he or she considers it to be necessary to do so in the interests of the due administration of justice."
6. Internal Memo Re: Information Regarding Complaints Opened in 1993-94 and 1994-95 to June 10, 1994, prepared for the Canadian Judicial Council, 16 June 1994.
7. Canadian Judicial Council By-Laws, Art. VIII, s. 8.05(a), (hereinafter CJC By-Laws).
8. CJC By-Laws, s. 8.05(d).
9. CJC By-Laws, s. 8.07(a).
10. Judges Act, R.S.C. 1985, c. J-1, s. 63(3): "The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee."
11. Judges Act, s. 65.
12. CJC By-Laws, s. 8.03(a).
13. CJC By-Laws, s. 8.02(c).

14. CJC By-Laws, s. 8.03(b).
15. CJC By-Laws, s. 8.04(a)(i). In the early days of the Council the judges were asked to respond whenever a complaint was received, but this practice was soon abandoned.
16. CJC By-Laws, s. 8.04(a)(ii).
17. Canadian Judicial Council, *Annual Report 1991-1992* (Ottawa: Canadian Judicial Council, 1992) at p. 10.
18. Conversation with Executive Director, May 1994.
19. Taken from the Canadian Judicial Council Annual Reports, 1987-94. The review done in 1990 showed about 600 cases, including general complaints, prior to 1987.
20. Three files were closed as "discontinued" when the judge died, retired or resigned; one file was closed as "withdrawn" because the complainants withdrew their complaint.
21. *Hryciuk v. Ontario (Commission of Inquiry into removal from office)* (1994) 115 D.L.R. (4th) 227, 18 O.R. (3d) 695 (Ont. Div. Ct.); leave to appeal granted to the Court of Appeal: *Lawyers Weekly*, 2 December 1994. There was also the *Gratton* case involving a federally appointed judge: see *Canadian Judicial Council Inquiry Committee Pursuant to Subsection 63(3) of the Judges Act Re: The Honourable Mr. Justice F.L. Gratton* (11 July 1994).
22. See André Picard, "Quebec Bar Seeks Probe of Judge's Competence" *Globe and Mail* (20 January 1994).
23. Ann Landers, "Quebec Judge's Style of 'Justice' Sparks Outrage" *Toronto Star* (20 March 1994).
24. Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (the Wilson Report), *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: C.B.A., 1993).
25. *Law Times* (17 January 1994).
26. Internal Memo Re: Report on Files Closed Fiscal Year 1993-94, prepared for the Canadian Judicial Council, 31 March 1994, Appendix 1.
27. *Ibid.*, at p. 2.
28. Internal Memo, June 1994, at p. 2.
29. Canadian Judicial Council, *Annual Report 1992-93*, at p. 12.
30. *Ibid.*, at p. 12.
31. Internal Memo, March 1994, at p. 1.
32. Canadian Judicial Council, *Annual Report 1992-93*, at 13.
33. Nancy Thomson, a recent graduate of the University of Ottawa Law School and now a law clerk with a judge at the Supreme Court of Canada, prepared the statistical summaries used by the Council for the last two annual reports and has also worked with the Executive Director in refining the method of classifying complaints. She has very carefully gone through the complaint files for the past several years and her impression is the same as mine: the Council does a good, conscientious job in dealing with complaints.

34. Canadian Judicial Council, *Annual Report 1992-93*, at p. 11.
35. *Ibid.*, at p. 11.
36. Canadian Judicial Council, *Annual Report 1993-94*. The 1991-92 figures are comparable: 96% were closed by the chair and 62% of these were closed without comments being sought.
37. Canadian Judicial Council, *Annual Report 1992-93*, at p. 15.
38. Canadian Judicial Council, *Annual Report 1990-91*, at p. 12.
39. Canadian Judicial Council, *Annual Report 1992-93*, at pp. 14-15.
40. Michael Goldie, now of the B.C. Court of Appeal, concluded that the Council, or the Committee, or the Committee Chair, could express disapproval where circumstances warranted when closing a file that did not warrant a formal s. 63(2) investigation: Canadian Judicial Council, Internal Memoranda, 9 June 1994; D. M. M. Goldie, "Legal Opinion for Judicial Conduct Committee" (23 March 1990). See also letter of John J. Robinette to Associate Chief Justice MacKinnon (27 April 1982) as printed in "Case Report" (1983) 28 *McGill L.J.* 378 at p. 434. And compare the opinion expressed by Laskin C.J.C. in 1982, set out in the next section, and the concluding section, that Council can reprimand without recommending removal.
41. Canadian Judicial Council, *Annual Report 1992-93*, at p. 10, and CJC By-Laws, s. 8.05(a)(ii).
42. Canadian Judicial Council, *Annual Report 1991-92*, at p. 11.
43. *CJC Inquiry* (11 July 1994).
44. Canadian Judicial Council, *Annual Report 1993-94*, at p. 16. One was closed as "discontinued" because the judge retired. And the file was closed as "discontinued" because the judge resigned before the panel completed its review.
45. Canadian Judicial Council, *Annual Report 1992-93*, at p. 14.
46. Canadian Judicial Council, *Annual Report 1991-92*, at p. 11.
47. The Canadian Press report (*Globe and Mail*, 31 July 1993) had, however, no difficulty in putting names to the descriptions in the Annual Report.
48. Canadian Judicial Council, News Release, "Judicial Council Responds to 'Martensville' Complaints" (16 May 1994).
49. Judges Act, R.S. 1970-71, c. 55, s. 32(1); Judges Act, R.S.C. 1985, c. J-1, s. 63(1).
50. There were, however, complaints by a provincial Law Society, a provincial Human Rights Commission, a provincial Crown attorney, and a provincial Advisory Council on the Status of Women: see Internal Memo, 31 March 1994, at pp. 2, 7, 8, 11.
51. Canadian Judicial Council, *Annual Report 1992-93*, at p. 16.
52. See Judges Act, R.S.C. 1985, c. J-1, s. 63(6).
53. Internal Memo, 24 June 1993.
54. *Ibid.*

55. See "Case Report: Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Judicial Council" (1983) 28 *McGill L.J.* 378.
56. Internal Memo, 24 June 1993.
57. The press was well aware of the proceedings, however: see the *Toronto Star*, 11 December 1976.
58. Internal Memo, 24 June 1993.
59. *Ibid.*

Chapter 5

8. THE BERGER AND MARSHALL AFFAIRS

1. Letter of Justice T.R. Berger to Chief Justice Bora Laskin (3 December 1981), set out as Appendix "G" in "Case Report: Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger and Resolution of the Canadian Judicial Council" (1983) 28 *McGill L.J.* 378 at p. 403 (hereinafter "Case Report").
2. The members of the Committee of Investigation were: Hon. B.J. MacKinnon (Chair), Hon. James Hugessen, and Hon. W.R. Sinclair.
3. "Report of the Committee of Investigation to the Canadian Judicial Council", as set out in "Case Report", at pp. 391-92 (hereinafter "Committee Report").
4. "Committee Report", at p. 392.
5. Canadian Judicial Council, "Resolution", as set out in "Case Report", at p. 379.
6. "Case Report", at p. 378.
7. "Committee Report", at p. 384.
8. Letter of John J. Robinette to Associate Chief Justice B.J. MacKinnon (27 April 1982), set out as Appendix "P" in "Case Report", at pp. 434-36 (hereinafter "Robinette Letter").
9. "Committee Report", at p. 385.
10. "Robinette Letter", at p. 435.
11. "Robinette Letter", at pp. 435-6.
12. D. M. M. Goldie, "Legal Opinion for Judicial Conduct Committee" (23 March 1990).
13. *Ibid.*, at p. 1. Chief Justice Laskin, as Goldie noted (p. 2), had taken the view in a speech to the Canadian Bar Association in September, 1982 that the Council might attach a reprimand or admonishment without recommending removal. In Goldie's view, however, the result of a complaint "can be no more than a recommendation with respect to removal." The "Council and those properly delegated to speak on its behalf," he stated (p. 3), "may express disapproval of conduct without crossing the admittedly fine line between disapproval and reprimand or admonishment." The "fine line", he stated in a follow-up letter, dated 27 March 1990, is crossed if the Council states that a judge's remarks "are entirely unbecoming a representative of" the Bench. The line is too fine for me. From my reading of the history of the establishment of the Canadian Judicial Council, I agree with Laskin C.J.C.'s opinion.

14. Supreme Court Justices McLachlin, Sopinka, and Wilson are recent examples. See A. Wayne MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but Not Heard?" (1993) 3 *N.J.C.L.* 159 at p. 180. See also, Sean Fine, "More Judges Dare to Break Silence Away From Bench" *Globe and Mail* (13 November 1993). Compare the statements of Chief Justice Bora Laskin and Justice Sopinka, as quoted in MacKay at p. 173:

In a speech by Justice Sopinka, "Must a Judge be a Monk?" (Address to the Canadian Bar Association, Toronto, 3 March 1989) at p. 8, Sopinka J. stated: "While I support the rationale for *some* restrictions on speech, the public must also realize that judges *do* have views on issues and must have the confidence that the judiciary is capable of setting aside personal political views when such views threaten to interfere with their impartiality in deciding particular cases." In contrast, Chief Justice Bora Laskin in "Berger and Free Speech of the Judge" (Address to the Canadian Bar Association Annual Meeting, Toronto, 2 September 1982) at p. 10, stated: "Surely there must be one stance, and that is absolute abstention, except possibly where the role of a court is itself brought into question. Otherwise, a judge who feels so strongly on political issues that he must speak out is best advised to resign from the bench. He cannot be allowed to speak from the shelter of a 'judgeship'."

15. Jeremy Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29 *McGill L.J.* 369 at pp. 384-85.
16. P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 87.
17. Russell, at p. 87.
18. Russell, at p. 88.
19. Russell K. Osgood, "Judicial Independence" (Paper presented at the Cornell Lectures, 10-16 July 1994) at p. 37, forthcoming, *U. of Toronto Law Journal*.
20. See Webber, at pp. 375-400.
21. See Justice J. Sopinka, "Must a Judge Be a Monk?" (Address to the Canadian Bar Association, Toronto, 3 March 1989), as quoted in MacKay at p. 173.
22. See now the letter dated 10 April 1995 by Chief Justice Allan McEachern as chair of a five-member panel of the Judicial Conduct Committee of the Canadian Judicial Council criticizing as improper extra-judicial public statements by New Brunswick Justice Jean-Claude Angers against the federal government's proposed gun control legislation. See *Globe and Mail* 13 April 1995.
23. *Marshall* (1983) 57 N.S.R. (2d) 286 at 287 (N.S.C.A.).
24. *Ibid.*, at p. 321.
25. *Royal Commission on the Donald Marshall, Jr., Prosecution* (Province of Nova Scotia, December 1989).
26. A. Wayne MacKay, "Dispensing Justice in Canada: Exaggerating the Values of Judicial Independence" (1991) 40 *U.N.B.L.J.* 273.
27. Letter of Thomas J. McInnis, Attorney General of Nova Scotia, to the Right Honourable Brian Dickson (9 February 1990), as quoted in Report to the Canadian Judicial Council of the Inquiry

Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia (August 1990) at p. 17 (hereinafter Inquiry Committee Report).

28. Inquiry Committee Report, at p. 20.
29. *Ibid.*, at p. 18.
30. *MacKeigan v. Hickman* [1989] 2 S.C.R. 796.
31. As quoted in Inquiry Committee Report, at p. 19.
32. *Ibid.*, at p. 22.
33. *Ibid.*, at pp. 22-23.
34. *Ibid.*, at p. 27.
35. *Ibid.*, at p. 32.
36. *Ibid.*
37. *Ibid.*
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*, at p. 34.
41. *Ibid.*, at p. 35.
42. Reasons of Chief Justice McEachern, at p. 3, as appended to the Inquiry Committee Report.
43. Inquiry Committee Report, at p. 33.
44. Reasons of Chief Justice McEachern, at p. 8.
45. *Ibid.*, at p. 13.
46. Inquiry Committee Report, at p. 24.
47. Reasons of Chief Justice McEachern, at p. 1.
48. *Ibid.*, at p. 18.
49. *Ibid.*, at p. 23.
50. *Ibid.*, at p. 25.
51. McEachern C.J., as we have seen, had been sympathetic to Berger and was recently involved as the trial judge in the Gitksan land claim controversy: see M. E. Turpel, "The Judged and the Judging: Locating Innocence in a Fall Legal World" (1991) 40 *U.N.B.L.J.* 281 at p. 288.
52. Reasons of Chief Justice McEachern, at p. 25.
53. MacKay, "Judicial Free Speech and Accountability", at p. 206. Marshall was separately represented at the hearing. He was given standing because counsel for some of the judges attacked some of the Royal Commission findings.

Chapter 5

9. PROVINCIAL JUDICIAL COUNCILS

1. Provincial Courts Act, S.O. 1968, c.103. See Peter McCormick, "Judicial Councils for Provincial Judges in Canada" (1986) 6 *Windsor Y.B. Access Just.* 160 at p. 160; P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at p. 128.
2. *Royal Commission Inquiry into Civil Rights* (the McRuer Report) No. 1, vol. 2 (Toronto: Queen's Printer, 1968).
3. McCormick, at p. 161.
4. McRuer Report, at p. 540.
5. McCormick, at p. 166.
6. McRuer Report, at pp. 541-42.
7. Magistrates Act, R.S.O. 1960, c. 226, s.3(3). The Act was originally enacted in 1952: Magistrates Act, S.O. 1952, c.53.
8. McRuer Report, at p. 541.
9. Provincial Courts Act, S.O. 1968, c.103.
10. McCormick, at p. 190. McCormick notes that it was not until after the report of the Gale Commission in 1978 (see McCormick at p. 161, note 2) that Cabinet made any such appointments. The Associate Chief Justice of Ontario was added in 1989.
11. An Act to amend The Provincial Courts Act, 1968, S.O. 1970, c. 38, s. 2, amending s.8 of the Provincial Courts Act, 1968.
12. Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 56.
13. Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 60; see also, Courts of Justice Amendment Act, 1989, S.O. 1989, c. 55, s. 49.
14. *Hryciuk v. Ontario (Commission of Inquiry into removal from office)* (1994) 115 D.L.R. (4th) 227 (Ont. Div. Ct.). See also Donn Downey, "Censured Judge Trying to Count his Blessings" *Globe & Mail* (26 November 1993) and "Judge asks Court to Scrap Findings of Misconduct Probe" *Globe & Mail* (8 December 1993). Other inquiries are referred to in: Ontario, Courts of Justice Statute Law Amendment Act, 1993, Compendium, 14 December 1993.
15. Courts of Justice Act, 1984, S.O. 1984, c. 11, s.56(2).
16. Russell, at p. 181.
17. An Act to amend the Judges Act and the Financial Administration Act, Stat. Can. 1970-71, c. 55, s. 11; see ss. 31-33.
18. Provincial Court Act, S.B.C. 1969, c. 28.
19. *Ibid.*, s. 21.
20. *Ibid.*, s. 6.

21. Provincial Court Amendment Act, 1981, S.B.C. 1981, c. 26, s. 12 amending, *inter alia*, s. 15.
22. *Ibid.*, s. 11.
23. *Ibid.*, s. 12, amending, *inter alia*, s. 20.
24. Provincial Judges Act, S.M. 1972, c. 61, s. 6.
25. Provincial Court Amendment Act, 1981, S.B.C. 1981, c. 26, s. 12; see s. 20.
26. Provincial Judges Act, S.M. 1972, c. 61, s. 7(11).
27. McCormick, at p. 162.
28. Provincial Court Act, S.M. 1982-83-84, c. 52, s. 27(1).
29. Provincial Court Act, 1978, S.S. 1978, c. 42, ss. 15-17.
30. Provincial Court Act, 1978, S.A. 1978, c. 70, ss. 10-11. In *Campbell; Ekmecic; Wickman* [1995] 2 W.W.R. 469 (1994), (Alberta Q.B.), David McDonald J. declared that non judges could not constitutionally be involved in disciplining provincial court judges. He relied on statements in *Valente* (1985) 23 C.C.C. (3d) 193 (S.C.C.) that referred to "a judicial inquiry" and concluded that it "must be a truly *judicial* inquiry" with *no* non-judicial involvement (p. 568-9). An appeal was filed 2 December 1994. The decision is unlikely to be upheld by the Supreme Court of Canada. See also *Temela; Doyle* (1992) 71 C.C.C. (3d) 276 (N.W.T.C.A.), holding that a judicial council (in this case the judicial council for Territorial Court judges) in which the composition is controlled to too great an extent by the executive is not independent within the meaning of s. 11(d) of the Charter.
31. Provincial Court Act, 1978, S.S. 1978, c. 42, s. 15; Provincial Court Act, 1978, S.A. 1978, c. 70, ss. 10.
32. McCormick, at p. 191.
33. Provincial Court Act, 1978, S.S. 1978, c. 42, s. 17(2). It is suggested by McCormick at p. 176 that there is a similarity between the Saskatchewan legislation and the federal Judges Act because Chief Justice Culliton, who chaired the federal Judicial Conduct Committee, was a prime mover behind the creation of the Saskatchewan Council.
34. Provincial Court Act, 1978, S.A. 1978, c. 70, s. 11(2).
35. *Ibid.*, s. 9.
36. Provincial Court Amendment Act, 1981, S.B.C. 1981, c. 26, s. 4, adding s. 6.1. See McCormick, at p. 175.
37. McCormick, at p. 162, note 7 states that Mr. Justice Deschênes was critical of the exclusion of section 96 judges from the Quebec Council; see *The Sword and the Scales* (Toronto: Butterworths, 1979), at pp. 98-100.
38. Courts of Justice Act, R.S.Q., c. T-16, s. 248.
39. Courts of Justice Act, R.S.Q. c. T-16, s. 248(h); Territorial Court Act, R.S.N.W.T. 1988, c. T-2, s. 30.1(d).
40. Courts of Justice Act, R.S.Q. c. T-16, s. 269.

41. *Ibid.*, ss. 95, 279(b).
42. An Act to amend the Courts of Justice Act and the Code of Civil Procedure and to establish the Conseil de la magistrature, S.Q. 1978, c. 19, s. 33; see s. 269; see also, Courts of Justice Act, R.S.Q. c. T-16, s. 261.
43. Courts of Justice Act, R.S.Q. c. T-16, ss. 276, 279.
44. *Ibid.*, s. 276.
45. E.g., Provincial Court Amendment Act, S.B.C. 1981, c. 26, s. 19(1)(b); Provincial Court Amendment Act, 1988, S.S. 1988-89, c. 49, s. 11, amending s. 17(6.1)(c); Territorial Court Act, R.S.Y. 1986, c. 169, s. 36(1)(b).
46. Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 10.
47. Provincial Court Act, 1974, S.N. 1974, c. 77.
48. McCormick, at p. 192.
49. An Act to Amend Chapter 13 of the Acts of 1976, the Judges of the Provincial Magistrate's Court Act, S.N.S. 1980, c. 60, s. 2.
50. An Act to Amend the Provincial Court Act, S.N.B. 1985, c. 66.
51. McCormick, at p. 162.
52. Judges of the Provincial Court Act, S.N.S. 1978-79, c. 48, s. 17(1)(a) and (c).
53. Judges of the Provincial Court Act, S.N.S. 1978-79, c. 48, s. 17(1)(b).
54. An Act to Amend the Provincial Court Act, S.N.B. 1985, c. 66, s. 3, adding s. 6.1(1).
55. An Act to Amend the Provincial Court Act, S.N.B. 1987, c. 45, s. 8, amending s. 6.1(1).
56. An Act to Amend the Provincial Court Act, S.N.B. 1990, c. 21, s. 1, amending s. 6.1(1).
57. An Act to Amend the Provincial Court Act, S.N.B. 1987, c. 45, s. 8., amending s. 6.9(1).
58. An Act to Amend the Provincial Court Act, S.N.B. 1990, c. 21, s. 2, amending s. 6.9(1)(a).
59. Provincial Courts Act, S.O. 1968, c. 103, s. 8(2).
60. *Ibid.*, s. 4(2).
61. Provincial Court Amendment Act 1981, S.B.C. 1981, c. 26, s. 18(2).
62. An Act to Amend the Provincial Court Act, S.N.B. 1987, c. 45, s. 8. amending, *inter alia*, s. 6.10(5).
63. Judges of the Provincial Court Act, S.N.S. 1978-79, c. 48, s. 17(2).
64. Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 11(4).
65. See *Southam Inc. v. Quebec* (A.G.) (7 July 1993), Montreal 500-05-002581-906 (Que. Sup. Ct.); and *Southam Inc. v. Mercier et al.* [1990] R.J.Q. 437 (Que. Sup. Ct.).

66. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12. Royal Assent was given on 23 June 1994 and ss. 1-22, 23(1,3), 24-49, 58, 59 in force on proclamation; s.49 has been proclaimed, and s. 23(2) and ss. 50-57 will come into force on 1 September 1995.
67. Bill 16, The Provincial Court Amendment Act, 5th Sess., 35th Leg., Manitoba, 1994.
68. Nova Scotia is close to enacting new legislation at the time of writing: see *Lawyers Weekly*, 16 December 1994.
69. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 49(2).
70. *Ibid.*, s. 49(6), which specifies four-year, non-renewable terms. Subsection 49(7), however, allows for one of the first two judges (appointed under s. 49(2)(d)) and two of the lay members to hold office for six-year terms.
71. McCormick, at p. 166.
72. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 49(4).
73. Ontario, Courts of Justice Statute Law Amendment Act, 1993, Compendium, 14 December 1993 at p. 4.
74. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 49(17).
75. *Ibid.*, s. 51.4(1).
76. *Ibid.*, s. 51.4(2).
77. *Ibid.*, S.O. 1994, c. 12, s. 51.4(3).
78. McCormick, at p. 171.
79. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 51.4(14). There is also the power to refer the complaint to a mediator (s. 51.4(13)(c) in accordance with s. 51.5); again, both members must agree with this disposition.
80. *Ibid.*, ss. 49(14), 51.4(17) and (18).
81. *Ibid.*, s. 49(15).
82. *Ibid.*, ss. 49(15) and (18).
83. *Ibid.*, s. 51.4(18).
84. *Ibid.*, ss. 51.4(6) and (18).
85. *Ibid.*, s. 51.4(20).
86. *Ibid.*, s. 51.6(7). It is up to the Council to establish criteria: see s. 51.1(1).
87. *Ibid.*, ss. 51.6(9) and (10).
88. *Ibid.*, ss. 51.1(1) and 51.6(3).
89. *Ibid.*, s. 51.6(11).
90. *Ibid.*, s. 51(1).

91. *Ibid.*, S.O. 1994, c. 12, s. 51(4).
92. *Ibid.*, s. 51(3).
93. *Ibid.*, s. 51(6).
94. *Ibid.*, s. 51.3(3).
95. *Ibid.*, s. 51.9.
96. Courts of Justice Act, R.S.Q. c. T-16, s. 261.
97. Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges*, Report No. 72 (Winnipeg: Queen's Printer, 1989) at pp. 70-71.
98. Manitoba Law Reform Commission, at p. 70.
99. Bill 16, Provincial Court Amendment Act, 5th Sess., 35th Leg., Manitoba, 1994, s. 28(1).
100. *Ibid.*, s. 30.
101. *Ibid.*, s. 31(1)(b).
102. *Ibid.*, s. 31(1)(c).
103. *Ibid.*, s. 31(4).
104. *Ibid.*, s. 32(3). Employees in the civil service are also ineligible.
105. *Ibid.*, s. 32(1).
106. *Ibid.*, s. 32(2).
107. *Ibid.*, s. 33(3).
108. *Ibid.*, s. 35(1).
109. *Ibid.*, s. 35(2).
110. *Ibid.*, s. 35(3).
111. *Ibid.*, s. 36(1)(c).
112. *Ibid.*, s. 37(2)(a).
113. *Ibid.*, s. 37(5).
114. *Ibid.*, s. 39(4).
115. *Ibid.*, s. 39.1(1).
116. *Ibid.*, s. 39.4.
117. *Ibid.*, s. 39.8.
118. *Ibid.*, s. 28(4).
119. *Ibid.*, s. 39.9(1).

120. *Ibid.*, s. 39.6(1).
121. *Ibid.*, s. 39.6(3)(a).
122. *Ibid.*, s. 27.

Chapter 5

10. ENGLAND

1. I will be concentrating on England. For a brief discussion of Scotland, see E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law* (London: Longman, 1993) at p. 378.
2. Shimon Shetreet, *Judges on Trial* (Amsterdam: North-Holland, 1976) at p. 279.
3. Wade and Bradley, at p. 377.
4. Shetreet, at p. 95.
5. Shetreet, at p. 100. See the introductory chapter of this Report and Shetreet, chap. 6 for descriptions of the joint address procedure. See also Wade and Bradley, at p. 377.
6. Wade and Bradley, at p. 377; Shetreet, at p. 143.
7. Shetreet, at pp. 145 *et seq.*
8. *Ibid.*, at pp. 127-8.
9. Shetreet, at pp. 143-44.
10. *Gratton v. Canada (Judicial Council)* (1994) 115 D.L.R. (4th) 81, [1994] F.C. 710 (F.C.T.D.).
11. Wade and Bradley, at p. 377. See also Shetreet, at p. 108; J.R. Spencer, ed., *Jackson's Machinery of Justice* (Cambridge: Cambridge University Press, 1989) at p. 368, note 3.
12. Shetreet, at p. 274.
13. Courts Act 1971 (U.K.), 1971, c. 23, s. 17(4).
14. In fact, he offered to resign, but would lose any pension entitlement if he did so; instead, he was fired. See Joshua Rozenberg, *The Search for Justice: An Anatomy of the Law* (London: Hodder & Stoughton, 1994) at pp. 111-12.
15. Spencer, at p. 369, note 2.
16. Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1993) at p. 91.
17. Lord Chancellor's Department Press Release, 16 November 1992, as cited in Rozenberg, at p. 116.
18. *The Times* (6 July 1978) as cited in Wade and Bradley, at p. 382. Reprimands of High Court Judges have mainly been privately administered: see Justice, *The Judiciary in England and Wales* (London: Justice, 1992) at pp. 8-9. Robert Stevens could not document these cases in his book, *The Independence of the Judiciary*, because cases involving High Court judges are closed for 100 years.

19. Rozenberg, at pp. 113-4.
20. Spencer, at p. 368. He had been "publicly rebuked" in 1983 for writing to the *Daily Telegraph* about penal policy: see Stevens, at p. 166.
21. Quintin Hogg Hailsham of St. Marylebone, *A Sparrow's Flight: The Memoirs of Lord Hailsham of Marylebone* (London: Collins, 1990) at p. 429.
22. Hailsham, at p. 429. The Master of the Rolls, Lord Donaldson, thought that the Lord Chancellor should not exercise his power of dismissal without the agreement of the four Heads of Division: see Rozenberg, at p. 115.
23. See, e.g., Right Hon. Sir Francis Purchas, "Lord Mackay and the Judiciary" (22 April 1994) *New Law Journal* 527; and Sir Nicolas Browne-Wilkinson, "The Independence of the Judiciary in the 1980s" [1988] *Public Law* 44.
24. Rozenberg, at p. 118.
25. See David Pannick, *Judges* (Oxford: Oxford University Press, 1987) at pp. 96-104, where he proposes a Judicial Performance Commission.
26. Rozenberg, at p. 116, suggests a disciplinary panel from the senior judiciary.
27. Justice is the British Section of the International Commission of Jurists.
28. Justice, at p. 8.
29. *Ibid.*, at p. 14.
30. *Ibid.*, at p. 25. Appendix 8 sets out the suggested procedures as follows:

The Judicial Standards Committee would be a sub-committee of the Judicial Commission. It would have a separate secretariat. Complaints which were either vexatious or allegations of miscarriage of justice would be screened out and returned to the originator, where appropriate, with a note on legal aid for appeal and/or the address of JUSTICE or other aid organisation.

Members of the Committee would deal with complaints on a rota basis. Any party could request that the complaint be considered by a three person tribunal, but, in general, slight complaints, e.g. minor discourtesy, would be resolved by the member, with the power to advise the Judge as to future conduct and/or recommend an apology.

More serious complaints would be forwarded to the Judge and his comments returned to the Complainant. The member could demand transcripts and interview witnesses where appropriate. Resolution would be by Tribunal. It would be inappropriate for the procedure before the tribunal to be treated as a form of litigation between the complainant and the judge. In particular the proceedings should not be seen as a means of reopening the case in which the complaint arose and there should be no confrontation between the judge and the complainant. The judge's duty of observing proper judicial standards of behaviour is owed to the public at large, not just to the individual complainant. The procedure would therefore be similar to that employed in dealing with complaints against barristers—i.e. the case against the judge would be presented independently of the complainant.

First and second written warnings, usually accompanied by a recommendation for retraining, would be the normal penalties available. In extreme cases, the Tribunal could recommend suspension or dismissal to the Lord Chancellor.

The Committee could make references to itself, e.g. from press reports. The Court of Appeal could also refer after determining any appeal if a case presented disciplinary implications.

Complaints could not be dealt with until the end of the relevant proceedings and there should be a time limit of six months from that time.

Tribunals could be in public at the Judge's request, but would usually be in camera. Findings against a Judge should be made available to the press.

31. *Ibid.*, at p. 28.
32. *Ibid.*, at p. 30.
33. *Access to Justice: A consultation paper* (February, 1995) at p. 13.
34. *Ibid.*, at p. 14.

Chapter 5

11. THE UNITED STATES: FEDERAL SYSTEM

1. See, e.g., the bibliography in J.M. Shaman, S. Lubet & J.J. Alfini, *Judicial Conduct and Ethics* (Charlottesville, Va.: Michie, 1990).
2. *Report of the National Commission on Judicial Discipline & Removal* (Washington: National Commission, August 1993) (hereinafter *National Commission Report*) at p. ii. There were 842 federal judgeships in August 1993. Many observers are worried about the growth of the federal judiciary: see, e.g., J.H. Wilkinson J., "The Drawbacks of Growth in the Federal Judiciary" (1994) 43 *Emory L.J.* 1147.
3. As of January 1st, 1995, according to the Department of Justice.
4. *National Commission Report, supra*. See generally, Cynthia Gray, "National Commission on Judicial Discipline and Removal calls for moderate changes" (1994) 77 *Judicature* 271.
5. Some of the key articles have been published in the (1993) 142 *U. Penn. L.R.*: Stephen B. Burbank & S. Jay Plager, "Foreword: The Law of Federal Judicial Discipline and the Lessons of Social Science" at p. 1; Jeffrey N. Barr & Thomas E. Willging, "Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980" at p. 25; Peter M. Shane, "Who May Discipline or Remove Federal Judges? A Constitutional Analysis" at p. 209; Charles Gardner Geyh, "Informal Methods of Judicial Discipline" at p. 243; Emily Field Van Tassel, "Resignations and Removals: A History of Federal Judicial Service — and Disservice — 1789-1992" at p. 333.
6. *National Commission Report*, at p. i.
7. *Ibid.*, at p. iii.
8. *Ibid.*, at p. 7. No judge, however, has sought to continue to exercise judicial authority while imprisoned: *Ibid.*, at p. 15.

9. *Ibid.*, at p. 5. See also Peter M. Shane, "Who May Discipline or Remove Federal Judges? A Constitutional Analysis" (1993) 142 *U. Penn L.R.* 209.
10. Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. ss. 372(c) (1988 & Supp. IV 1992)).
11. *National Commission Report*, at p. 5.
12. *Ibid.*, at p. 6.
13. *Ibid.*, at p. 123.
14. *Ibid.*, at p. 28. The Constitution of the United States of America, II, s. 4.
15. *Ibid.*, at pp. 29 and 47. See generally: Warren S. Grimes, "The Role of the U.S. House of Representatives in Proceedings to Impeach and Remove Federal Judges" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. I (Washington: National Commission, 1993) at p. 39 (hereinafter *Research Papers*); and Michael J. Gerhardt, "The Senate's Process for Removing Federal Judges" in *Research Papers*, Vol. I, at p. 139.
16. U.S. Constitution, Art. I, s. 3.
17. *National Commission Report*, at 29.
18. For a complete list, see *ibid.*, at p. 30.
19. *Ibid.* See also, Mary Volcansek, *Judicial Impeachment: None Called for Justice* (U. of Illinois Press, 1993).
20. *Ibid.*, at p. i. Since 1983, five sitting judges have been so indicted, and four have been convicted.
21. *Ibid.*, at p. 2.
22. *Ibid.*, at p. 50.
23. *Ibid.*, at pp. 50-1.
24. *Ibid.*, at p. 51.
25. *Nixon v. U.S.* 113 S.Ct. 732 (1993); *National Commission Report*, at p. 52.
26. *National Commission Report*, at p. 59.
27. *Ibid.*, at p. 59.
28. *Ibid.*, at pp. 24 and 78. Some have expressed concern that visible minority judges have been improperly targeted, but the Commission stated that they were "not persuaded that any federal judge in the past decade was improperly targeted for criminal prosecution."
29. *Ibid.*, at p. 19.
30. *Ibid.*, at p. 21.
31. *Ibid.*, at p. 83. The chair of the National Commission, Robert Kastenmeier, had been, by and large, the author of the 1980 Act: correspondence with Russell R. Wheeler, Deputy Director, Federal Judicial Center, Washington, 12 April 1995.

32. *Chandler v. Judicial Council of the Tenth Circuit* 398 U.S. 74 (1970); *National Commission Report*, at p. 3. See generally, Russell R. Wheeler and A. Leo Levin, *Judicial Discipline and Removal in the United States* (Federal Judicial Center Staff Paper, July 1979). For further background, see "Judicial Ethics" (1970) 35 *Law and Contemporary Problems* 1-228.
33. Richard L. Marcus, "Who Should Regulate Federal Judges and How?" in *Research Papers*, Vol. I, 363 at p. 364.
34. *National Commission Report*, at p. 84. See also the background papers to the National Commission, in particular, Jeffrey N. Barr and Thomas E. Willging, "Administration of the Federal Judicial Conduct and Disability Act of 1980" in *Research Papers*, Vol. I, at p. 477, and (1993) 142 *U. Penn. L.R.* 1; Charles Gardner Geyh, "Informal Methods of Judicial Discipline" in *Research Papers*, Vol. I, at p. 713, and (1993) 142 *U. Penn. L.R.* 243; and Marcus, in *Research Papers*, Vol. I, at p. 363.
35. See chapter 3, section 3. See also Geyh, "Informal Methods of Judicial Discipline" (1993) 142 *U. Penn. L.R.* at pp. 271-77.
36. 28 U.S.C. s. 372(c)(1).
37. *National Commission Report*, at p. 98. See generally, Beth Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges" in *Research Papers*, Vol. I, at p. 867.
38. There are 11 numbered circuits and the D.C. and Federal Circuits. There are also a number of national courts such as the Court of International Trade.
39. *National Commission Report*, at p. 84; 28 U.S.C. s. 372(c)(3)(A).
40. *Ibid.*, at p. 99.
41. *Ibid.*, at pp. 99-100.
42. *Ibid.*, at pp. 100-101.
43. *Ibid.*, at p. 92; Canadian Judicial Council, *Annual Report 1992-1993* (Ottawa: Canadian Judicial Council, 1993) at p. 11.
44. 28 U.S.C. s. 372(c)(3)(B).
45. *National Commission Report*, at pp. 89-90; and Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 95.
46. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 107.
47. *National Commission Report*, at pp. 89-90.
48. *Ibid.*, at p. 84.
49. *Ibid.*, at p. 84; 28 U.S.C. s. 372(c)(6)(B).
50. *Ibid.*, at p. 87; and Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at pp. 112-17.
51. Barr and Willging, at p. 115.
52. It should be noted, in addition, that 28 U.S.C. s.372(c)(6)(B)(iv) authorizes the circuit council to order that, "on a temporary basis, for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint."

53. *National Commission Report*, at p. 105; 28 U.S.C. s. 372(c)(4)(A).
54. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 123.
55. *Ibid.*, at p. 121.
56. *National Commission Report*, at p. 84; 28 U.S.C. s. 372(c)(10).
57. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 89.
58. *Ibid.*, at p. 91.
59. *Ibid.* at p. 163.
60. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at pp. 123-24. The Conference acts through its Committee to Review Circuit Council Conduct and Disability Orders: *National Commission Report*, at p. 84.
61. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 54.
62. *Ibid.*, at p. 132.
63. *Ibid.*, at p. 137.
64. Charles Gardner Geyh, "Means of Judicial Discipline Other Than Those Prescribed By the Judicial Discipline Statute, 28 U.S.C. Section 372(c)" in *Research Papers*, Vol. I, 713 at p. 759.
65. *Hearings Before the National Commission on Judicial Discipline and Removal* (Testimony of John C. Godbold) at pp. 57-58 (1992), as quoted in Geyh, at p. 760.
66. Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 79.
67. *National Commission Report*, at p. 6.
68. *Ibid.*, at p. 104.
69. *Ibid.*, at p. 113.
70. *Ibid.*, at p. 124.
71. *Ibid.*, at p. 85. See generally, Stephen B. Burbank, "Politics and Progress in Implementing the Federal Judicial Discipline Act" (1987) 71 *Judicature* 13.
72. See, e.g., *National Commission Report*, at pp. 107 *et seq.*
73. *Ibid.*, at p. 85.
74. *Ibid.*, at p. 86.
75. Jeffrey N. Barr and Thomas E. Willging, "Administration of the Federal Judicial Conduct and Disability Act of 1980" in *Research Papers*, Vol. I, 477 at pp. 489-90.
76. *National Commission Report*, at p. 107.
77. *Ibid.*, at p. 109. See also, Barr and Willging, (1993) 142 *U. Penn. L.R.* 25 at p. 130.
78. Conversation with Jeffrey Barr, Assistant General Counsel, Administrative Office of the U.S. Courts, Washington, 10 March 1995.

79. *National Commission Report*, at p. 127.
80. *Ibid.*, at p. 101.
81. *Ibid.*, at p. 123.
82. Barr and Willging, "Administration of the Federal Judicial Conduct and Disability Act of 1980" in *Research Papers*, Vol. I, 477 at p. 651.
83. *National Commission Report*, at p. 124.

Chapter 5

12. STATE SYSTEMS

1. For the background to the California Commission, see Jack Frankel, "Looking Back and Looking Forward" (1991) 75 *Judicature* 83. See also, Russell R. Wheeler and A. Leo Levin, *Judicial Discipline and Removal in the United States* (Federal Judicial Center Staff Paper, July 1979).
2. Judith Rosenbaum, *Practices and Procedures of State Judicial Conduct Organizations* (Washington: American Judicature Society, 1990) Appendix "A". See also, J.M. Shaman, S. Lubet & J.J. Alfani, *Judicial Conduct and Ethics* (Charlottesville, Va.: Michie, 1990) at pp. 5-6 and chapter 13.
3. Rosenbaum.
4. Timothy R. Murphy, "The Effects of Criminal Prosecutions of State Judges on State Judicial Disciplinary Proceedings" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. II, (Washington: National Commission, 1993) at p. 1337.
5. Rosenbaum, Appendix "A".
6. Lisa Milord, "The U.S. State Systems of Judicial Discipline" (unpublished address to the Canadian Judicial Council, 24 March 1994) at p. 3.
7. "Judicial Conduct Organizations' Complaint Dispositions, 1991-92" (1993) 15 *Judicial Conduct Reporter* 2.
8. Rosenbaum, at p. 8.
9. "Table 2: 1990-91 Budgets and Staff" (1992) 14 *Judicial Conduct Reporter* 3.
10. *Report of the National Commission on Judicial Discipline and Removal* (Washington: National Commission, August 1993) at pp. 183-84.
11. *National Commission Report*, at p. 183.
12. *Ibid.*
13. Murphy, at p. 1337. Some of these States, e.g. California and Pennsylvania, have subsequently changed their procedures described in the text: conversation with Cynthia Gray, American Judicature Society, 1 May 1995.
14. See also, Federal Judicial Center Staff Paper, 1979.
15. See, e.g., the Fall issue of (1993) 15 *Judicial Conduct Reporter* 1.

16. "Judicial Conduct Organizations' Complaint Dispositions, 1991-92" (1993) (Fall) 15 *Judicial Conduct Reporter* 2.
17. Rosenbaum, at pp. 15 and 21, Appendix "A".
18. See Murphy, at p. 1397 and table on p. 1347.
19. Rosenbaum, at p. 22, Appendix "A".
20. *Ibid.*, at p. 34.
21. The total is six judges because the state bar also selects a judge. Rosenbaum, at p. 18, Appendix "A".
22. Ohio can also discipline a judge for a violation of the code of professional responsibility governing attorneys. Murphy, at p. 1381.
23. Drawn from Rosenbaum, at pp. 12-27, Appendix "A".
24. *Ibid.*, at p. 10.
25. *Ibid.*
26. *Ibid.*
27. *Ibid.*, at pp. 26-27.
28. *Ibid.*, at p. 25.
29. *Ibid.*, at p. 27.
30. See American Bar Association, Center for Professional Responsibility, "Memorandum Re Proposed Model Rules for Judicial Disciplinary Enforcement" (19 November 1993); and Vivi L. Dilweg, "Proposed New Judicial Disciplinary and Enforcement Standards: Due process and accountability for judges" [1993] *Judges' Journal* 32.
31. Milord, at p. 6; and A.B.A. Memorandum, at p. 1.
32. *Ibid.*
33. *Ibid.*, at p. 2.
34. *Ibid.*, at p. 5.
35. American Bar Association, *Model Rules for Judicial Disciplinary Enforcement* (November 1993), Rule 2, The Commission on Judicial Conduct (hereinafter A.B.A. Model Rules).
36. A.B.A. Memorandum, at p. 3.
37. *Ibid.*, at p. 5.
38. A.B.A. Model Rules, Rule 3, Organization and Authority of the Commission.
39. *Ibid.*, Rule 4, Disciplinary Counsel, & 5, Commission Counsel.
40. A.B.A. Memorandum, at p. 4.
41. *Ibid.*, at pp. 8-9; and A.B.A. Model Rules, Rule 17, Screening and Investigation.

42. A.B.A. Model Rules, Rule 11, Confidentiality.
43. Rosenbaum, at p. 5, as cited in A.B.A. Memorandum, at p. 3. California changed their public hearing rule in 1988 to provide an open hearing if moral turpitude, dishonesty, or corruption is alleged: Rosenbaum, at p. 7.
44. A.B.A. Model Rules, Rule 24, Hearing.
45. *Ibid.*, Rule 7, Proof.
46. *Ibid.*, Rule 25, Review.
47. *Ibid.*, Rule 26, Complaint against a Member.
48. *Ibid.*, Rule 6, Grounds for Discipline, Sanction Imposed, Deferred Discipline Agreement.

Chapter 5

13. CONCLUSION

1. *Report of the National Commission on Judicial Discipline and Removal* (Washington: National Commission, August 1993) at p. 81.
2. Speech to the Canadian Judges Conference at the Annual Meeting of the Canadian Bar Association, Toronto, August, 1994.
3. With the possibility of an appeal to the Court of Appeal: Provincial Court Amendment Act, 1981, S.B.C. 1981, c. 26, s. 12.
4. The Council has, whether deservedly or not, been subject to criticism. See, e.g., *Journal de Montreal* court reporter Rodolphe Morissette's new book *The Judges: When Myths Are Shattered* (Montreal: VLB Editeur, 1994) and newspaper articles such as: Geoff Baker, "Judging the Judge: How the System was Stacked in Favor of Raymonde Verreault" *Montreal Gazette* (7 July 1994); and André Picard, "Quebeckers lash out at handling of sexual-assault cases" *Globe and Mail* (29 January 1994). The Quebec Judicial Council has been challenged by Judge Andrée Ruffo: see *Andrée Ruffo v. Le Conseil de la magistrature* [1992] R.J.Q. 1796 (Quebec C.A.), appeal heard by the Supreme Court of Canada March, 1995, judgment reserved.
5. Canadian Judicial Council By-laws, s. 8.02 (hereinafter C.J.C. By-laws).
6. C.J.C. By-laws, s. 8.02(b).
7. Jeffrey Barr and Thomas Willging, "Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980" (1993) 142 *U. Penn. L.R.* 25 at p. 137.
8. C.J.C. By-laws, s. 8.04(a).
9. See Barr and Willging, at pp. 52 and 89.
10. "Table 2: 1990-91 Budgets and Staff" (1992) 14 *Judicial Conduct Reporter* 3.
11. Canadian Judicial Council, *Annual Report 1993-1994* (Ottawa: Canadian Judicial Council, 1993) at p. 43.

12. There are mixed approaches to actual hearings: in Ontario, for example, the Law Society Act, R.S.O. 1990, c. L.8, s. 33(4), provides for closed hearings; whereas Quebec, An Act Respecting the Barreau du Quebec, R.S.Q. c. B-1, s. 103, provides for public hearings, but the Committee on Discipline may, of its own initiative or upon request, order that a hearing be held *in camera*. In Ontario, the Health Disciplines Act, R.S.O. 1990, c. H.4, s. 67, provides that all inquiries and investigations shall be confidential.
13. Judges Act, R.S.C. 1985, c. J-1, s. 63(6).
14. For e.g., Nova Scotia, Judges of the Provincial Court Act, S.N.S. 1978-79, c. 48, s. 2: see s. 17(2); and Alberta, Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 11(4). See also New Brunswick, An Act to Amend the Provincial Court Act, S.N.B. 1987, c. 45, s. 8.; see s. 6.10(5).
15. *Dagenais v. C.B.C.* [1994] 3 S.C.R. 835, (1994) 94 C.C.C. (3d) 289; *C.B.C. v. McConachie et al.* (8 December 1994) (S.C.C.).
16. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 16, amending s. 51.4(6).
17. Bill 16, Provincial Court Amendment Act, 5th Sess., 35th Leg., Manitoba, 1994, s. 33(3).
18. At the C.I.A.J. meeting in October, 1994.
19. Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, s. 34.
20. Donald Rowat, "The Ombudsman should Supervise the Courts" (July/August 1992) *Options Politiques*.
21. Speech by Lamer C.J.C. to the Council of the Canadian Bar Association, 22 August 1993.
22. See *MacKeigan v. Hickman* (1989) 50 C.C.C. (3d) 449 at p. 460 *per* La Forest J. and at p. 458 *per* Wilson J.
23. Judges Act, s. 63(4).
24. This is the suggested approach in the *National Commission Report*, at pp. 99-100.
25. The Canadian Judges Conference submission to me, dated 30 June 1994, states at p. 7: "The Conference considers appropriate the Canadian Judicial Council's present practice of expressing its disapproval of conduct falling short of 'good behaviour' within the meaning of s. 99 of the *Constitution Act of 1867*, as amended."
26. Courts of Justice Statute Law Amendment Act, 1994, s. 16, amending s. 51.6(11)(a).
27. C.J.C. *Annual Report 1993-94* at p. 13.
28. Annual Meeting of the C.B.A., September 1982, quoted in Russell, "Case Comment on *MacKeigan v. Hickman*" (1990) 69 *Can. B. Rev.* 559 at p. 569.
29. Courts of Justice Statute Law Amendment Act, 1994, s. 16, amending s. 51.6(11)(f).
30. Provincial Court Amendment Act, s. 39.1(1)(f).
31. E.g., Alberta and British Columbia.

CHAPTER SIX: CODES OF CONDUCT

Chapter 6

1. CANADIAN CODES

1. Canadian Bar Association Special Committee, *The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at pp. 24-25.
2. Hon. J.O. Wilson, *A Book for Judges* (Ottawa: Supply & Services Canada, 1980).
3. Hon. G  rald Fauteux, *Le Livre du Magistrat* (Ottawa: Supply and Services Canada, 1980).
4. Wilson, at p. v.
5. *Ibid.*, at p. vi.
6. *Ibid.*, at p. xiii.
7. *Ibid.*, at p. vii.
8. *Ibid.*, at p. vi.
9. Canadian Judicial Council, *Annual Report, 1988-89*, at p. 9.
10. Letter accompanying memorandum of E.M. Culliton to The Hon. L.P. de Grandpr   (9 August 1983). The Canadian Judges Conference had also started to develop a code of judicial ethics in the mid-1980s with Mr. Justice Roy Matas of Manitoba as the chair of the committee, but this was also actively discouraged by the Canadian Judicial Council and the project was abandoned: correspondence with the Hon. Bertha Wilson, 14 April 1995, who had been a member of the committee.
11. C.B.A. Report (1985) at p. 5.
12. Canadian Judicial Council, *Commentaries on Judicial Conduct* (Quebec: Yvon Blais, 1991).
13. *Ibid.*, at p. vii.
14. *Ibid.*
15. *Ibid.*, at p. viii.
16. *Ibid.*, at pp. 4-5.
17. *Ibid.*, at p. 5.
18. Judicial Code of Ethics, adopted pursuant to s. 261 of the Courts of Justice Act (R.S.Q., c. T-16), O.C. 643-82, 17 March 1982, G.O.Q. 1982.II.1253. A draft code was submitted to members of the Quebec Judicial Council on 13 January 1981; Ministerial approval was given 17 March 1982.
19. B.C. Code of Judicial Ethics, Revised 1994.
20. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 51.9.
21. Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability*, Report of the C.B.A. Task Force on Gender Equality in the Legal Profession (Ottawa: Canadian Bar Association, August 1993) (Chair: Hon. Bertha Wilson) at p. 199.

Chapter 6

2. U.S. CODES

1. See J.M. Shaman, S. Lubet & J.J. Alfini, *Judicial Conduct and Ethics* (Charlottesville, Va.: Michie, 1990) at p. 3. See also, Lisa L. Milord, *The Development of the ABA Judicial Code* (Chicago: American Bar Association, 1992).
2. Justice Shirley S. Abrahamson, "Foreword" in Shaman, Lubet & Alfini, *Judicial Conduct and Ethics*, at p. vi.
3. *Ibid.* at pp. vi-vii.
4. *Ibid.*, at p. vii.
5. Shaman *et al.*, at p. 3.
6. Abrahamson, at p. vii.
7. Shaman *et al.*, at p. 4.
8. J.M. Shaman, S. Lubet & J.J. Alfini, "The 1990 Code of Judicial Conduct: An Overview" (1990) 74 *Judicature* 21. See also Shaman *et al.*, at p. 492.
9. Abrahamson, at p. x.
10. Code of Conduct for United States Judges, in *Guide to Judiciary Policies and Procedures, Vol II*, (Washington: Federal Judicial Center, June 1990) at p. 2 (Commentary to Canon 2A). Although the A.B.A. 1983 Model Rules of Professional Responsibility no longer include an "appearance standard", one expert writes: "it is axiomatic that 'justice requires the appearance of justice' and it is likely unthinkable to abandon the appearances standard with respect to judicial conduct." See Beth Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. 1, (Washington: National Commission, 1993) 867 at p. 897.
11. Thode, Reporter's Notes to Code of Judicial Conduct 43 (1973) cited in Shaman *et al.*, "The 1990 Code of Judicial Conduct: An Overview", at p. 21.
12. Shaman *et al.*, "The 1990 Code of Judicial Conduct: An Overview", at p. 21.
13. Code of Conduct for United States Judges, Canon 2C.
14. American Bar Association, Model Code of Judicial Conduct (1972), Canon 2, Commentary as amended on 8 August 1984.
15. Shaman *et al.*, *Judicial Conduct and Ethics*, 1993 Cumulative Supplement, at p. 77.
16. See Lisa Milord, "1990 Code Adoption Update" (Summer 1992) *Judicial Conduct Reporter* 7.
17. *Ibid.*
18. *Ibid.*, at p. 8.
19. *Ibid.*.
20. Cynthia Gray, "1990 ABA Model Code Adoption Update" (Summer 1993) *Judicial Conduct Reporter* 4 at pp. 6-7.

21. See the 1990 ABA Model Code Adoption Reports published in the following editions of the *Judicial Conduct Reporter*: Spring 1992, Summer 1992, Spring 1993, & Summer 1993.

Chapter 6

3. U.S. FEDERAL CODE

1. See generally, *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees, distributed by the Federal Judicial Center, Washington, June 1990. The Committee is now chaired by Judge Lamier Anderson, III. See also Beth Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol.I (Washington: National Commission, 1993) at p. 867; and Abe Krash *et al.*, "Memorandum Concerning the Constitutionality of Canons 2(c), 3(a)(6), 4(a) and 7 of the Code of Judicial Conduct" in *Research Papers*, Vol.II, at p. 935.
2. A.B.A., Model Code of Judicial Conduct (1990), Preamble.
3. *Report of the National Commission on Discipline and Removal* (Washington: National Commission, 1993) at p. 98.
4. Code of Conduct for United States Judges, Canon 1, Commentary.
5. A.B.A., Model Code of Judicial Conduct (1990), Preamble.
6. *Ibid.*
7. Code of Conduct for United States Judges, Canon 1, Commentary.
8. Shaman *et al.*, *Judicial Conduct and Ethics*, 1993 Cumulative Supplement at p. 1: 34 states issue advisory opinions.
9. Shaman *et al.*, *Judicial Conduct and Ethics*, 1993 Cumulative Supplement at p. 2.
10. Published Advisory Opinions, Chapter IV in *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees.
11. A similar summary, Advisory Opinion 62, was produced in 1979. See: Compendium of Selected Opinions, Chapter V in *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees.
12. *Report of the National Commission on Judicial Discipline and Removal*, at p. 99.
13. Canadian Judicial Council, *Commentaries on Judicial Conduct*, at p. 35.
14. *Ibid.*, at pp. 35-36.
15. Code of Conduct for United States Judges, Canon 5D.
16. *Ibid.*, Canon 5D(1).
17. Canadian Judicial Council, *Commentaries on Judicial Conduct*, at pp. 63-64.
18. Code of Civil Procedure of Quebec, R.S.Q. c. C-25, art. 234.
19. The Quebec Code uses the word "recused", which is commonly used in the American literature. The French words used are "être récusé".

20. Code of Conduct for United States Judges, Canon 3C(1)(d).
21. *Ibid.*, Canon 3A(6).
22. *Ibid.*, Commentary.
23. *Ibid.*, Canon 4A.
24. *Ibid.*, Canon 4, Commentary.
25. Abe Krash *et al.*, "Memorandum Concerning the Constitutionality of Canons 2(c), 3(a)(b), 4(a) and 7 of the Code of Judicial Conduct" in *Research Papers of the National Commission on Judicial Discipline and Removal*, Vol. I (Washington: National Commission, 1993) at p. 867.
26. *Ibid.*, at p. 955.

Chapter 6

4. CONCLUSION

1. The Professional Development Committee of the Canadian Association of Provincial Court Judges has started to work on the drafting of a code: see (1984) 18 *Provincial Judges Journal* at p. 21.
2. Speech delivered to the October, 1994 Conference of the Canadian Institute for the Administration of Justice, Ottawa: see *C.I.A.J. Newsletter*, Winter, 1995 at p. 10. See also the speech by Lamer C.J.C. at the Mid-Winter Meeting of the Canadian Bar Association, 26 February 1995, P.E.I.: "Council is also moving forward, in cooperation with the Canadian Judges Conference, with the development of the Code of Conduct for federally appointed judges. A working group is devoting considerable energy to this project, but there is, of course, much to be done and it is important that the work be done carefully and well. No doubt, at the appropriate time, the input of the Canadian Bar will be most useful and I hope we can count on you when that moment arrives."
3. See, e.g., A.B.A. Model Code of Judicial Conduct (1990), Preamble: "The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct."
4. See the volume prepared by the American Judicature Society for the 13th National College on Judicial Conduct and Ethics, October 1992, Baltimore, and the 14th National College in October 1994, Chicago.
5. A.B.A., Model Code of Judicial Conduct (1972), Canon 6.
6. A.B.A., Model Code of Judicial Conduct (1990), Canon 4H.
7. *Ibid.*
8. *Ibid.*, Commentary preceding Canon 4H.
9. Code of Conduct for United States Judges, Canon 6.
10. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824.

11. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1724-45. See generally, Nolan, at pp. 890-94 and 904.
12. See Financial Disclosure Instructions, chapter VII in *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees.
13. *Report of the National Commission on Judicial Discipline and Removal* (Washington: National Commission, August 1993) at pp. 119-20 made one recommendation with respect to this reporting and that was to reexamine the issue of whether the judge should continue to be informed of who requested access. Although the Code of Conduct does not apply to Supreme Court judges, the 1989 Ethics Reform Act does: see Nolan, at p. 893.
14. Nolan, at p. 890; see also p. 910.
15. Code of Conduct for United States Judges, Canon 6, Commentary.
16. Shaman *et al.*, *Judicial Conduct and Ethics*, 1993 Cumulative Supplement, at p. 42; Nolan, at p. 902.
17. Nolan, at p. 892, states that honoraria up to \$2,000 can, however, be made to a charity which does not benefit the judge or the judge's family, and if no tax receipt is given. There is uncertainty as to whether royalties are included in the 15% cap on outside earnings imposed by the Act: see Shaman *et al.*, *Judicial Conduct and Ethics*, 1993 Cumulative Supplement, at p. 43.
18. It was a problem in the past and in 1905 the Judges Act (Stat. Can. 1905, c. 31, s. 7) was amended to provide that judges are restricted to their judicial duties. They obviously continued to act as commissioners and arbitrators but in 1920 the Act (Stat. Can. 1920, c. 56, s. 12) provided that judges were not to be paid for acting as commissioners, except for travelling expenses and in 1921 the Act (Stat. Can. 1921, c. 36, s. 4) provided that judges were not to act as commissioners or arbitrators unless nominated by the Governor in Council.
19. See M. L. Friedland, "Presidential Commission on Conflicts of Interest", December, 1991, set out in the University of Toronto *Bulletin*, 13 January 1992 and the new University "Policy on Conflict of Interest", approved by the Governing Council, 22 June 1994.
20. *Report of the National Commission on Judicial Discipline and Removal*, at p. 119.

CHAPTER SEVEN: PERFORMANCE EVALUATION

1. See W. K. Slate, "New Paradigms of Judicial Discipline: Application of Foreign Models in the American System" in *Research Papers of the National Commission on Judicial Discipline and Removal* (Washington, 1993) 1405 at p. 1409.

Chapter 7

1. THE UNITED STATES

1. See S. Keilitz and J. McBride, "Judicial Performance Comes of Age" (1992) 16 *State Court Journal* 4.
2. *Ibid.*
3. See *Kopyto* (1987) 39 C.C.C. (3d) 1 (Ont. C.A.).

4. J. Atkinson and R. Stiteler, "Bench Marks: Passing Sentence on Dallas Judges" in *D Magazine*, August, 1979, 64 at p. 67.
5. A memorandum by Rae Lovko dated 4 February 1992 from the National Center for State Courts lists Alaska, Colorado, Connecticut, Illinois, Maryland, New Jersey, and Utah as having established programmes; and Arizona, Delaware, Hawaii, Minnesota, New Mexico, North Dakota, and Washington as currently developing programmes.
6. Judge R. R. Rader, "Evaluate Your Own Performance on the Bench" [1991] *Judges Journal* 33 at p. 38; see also W. Schwarzer, "Grading the Judge" (1984) 10 *Litigation*, part 2, at p. 5.
7. *Ibid.*, at p. 34.
8. *Ibid.*, at p. 38.
9. *Report of the National Commission on Judicial Discipline and Removal* (Washington, 1993) at p. 118.
10. *Ibid.*
11. *American Bar Association Guidelines for the Evaluation of Judicial Performance* (Washington, 1985). The National Center for State Courts memorandum by Rae Lovko, dated 4 February 1992, points out that in 1987 the Committee proposed that the Guidelines be applied to the federal judges and that in 1990 the A.B.A. programme was taken over by the National Center for State Courts.
12. Guidelines, at p. ii.
13. *Ibid.*, at p. iii.
14. *Ibid.*, at p. 2, citing A. Handler, "Testing the Theories" (1984) 8 *State Court Journal* 8.
15. *Ibid.*, Part I of the Guidelines, at p. ix.
16. *Ibid.*, at p. iv.
17. *Ibid.*, at p. 2.
18. *Ibid.*, Guideline 2-2, at p. ix.
19. *Ibid.*, Guideline 3, at p. x-xi.
20. *Ibid.*, at p. xii.
21. *Ibid.*, Guideline 4, at p. xiii.
22. *Ibid.*, at p. 31.
23. *Ibid.*, at pp. 31-3.
24. See S. Keilitz and J. McBride, "Judicial Performance Evaluation Comes of Age" (1992) 16 *State Court Journal* 4. New Jersey has a Gubernatorial reappointment process with senate confirmation, and Connecticut has reappointment by a legislative joint standing committee on the judiciary. Summaries of the information is given to these bodies.
25. See generally, Keilitz and McBride. See also (1993) 77 *Judicature* 109.

26. Keilitz and McBride, at p. 12. See Manitoba Law Reform Commission, *The Independence of Provincial Judges* (Winnipeg, 1989) at pp. 92 *et seq.*
27. M. Sponzo, "Independence vs. Accountability" [1987] *Judges Journal* 13 at p. 42.
28. *Ibid.*, at p. 43.

Chapter 7

2. ENGLAND

1. Committee on the Judiciary, *The Judiciary in England and Wales* (London: Justice, 1992) at p. 14.
2. *Report of the Royal Commission on Criminal Justice* (London, 1993) at p. 141.
3. *Ibid.*
4. Speech of 27 July 1993: "Opening Address at a Conference on 'Criminal Justice after the Royal Commission' " at p. 9.

Chapter 7

3. CANADA

1. "Committee Reports", (1991) 9 *Nova Scotia Barrister's Society*.
2. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 16, amending s. 51.11.
3. *The Annual Report of The Judicial Appointments Advisory Committee* (Toronto, 1994) states at p. 6: "Evaluation can be useful in shaping educational programs for judges and in measuring the effectiveness of the appointments process."
4. The Honourable T. G. Zuber, *Report of the Ontario Courts Inquiry* (Ontario, 1987) at pp. 168-9.
5. *Ibid.*
6. Manitoba Law Reform Commission, at pp. 92 *et seq.*
7. *Ibid.*
8. See the report of the Professional Development Committee (Judge A. E. Rounthwaite, chair) set out in (1994) 18 *Provincial Judges Journal* 19. The Committee is also exploring a mentoring programme whereby a judge wishing feedback on courtroom demeanour might invite a retired colleague and a communications professional "to observe, and then discuss their impressions with the judge." In addition, they are considering a scheme whereby experienced judges might act as mentors to newly appointed judges.

Chapter 7

4. CONCLUSION

1. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 16, amending s. 51.11.
2. *Report of the Royal Commission on Criminal Justice*, at p. 141.

3. Letter and Guidelines sent by Peter Freeman of the Law Society of Alberta, dated 19 May 1994.
4. P. H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at p. 190.

CHAPTER EIGHT: JUDICIAL EDUCATION

Chapter 8

1. INTRODUCTION

1. *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at p. 36.
2. Chief Justice Antonio Lamer, Address to the Canadian Judicial Conference, 20 August 1994, (unpublished) at p. 10.
3. Mr. Justice Frank Iacobucci, "Judicial Education at the National Judicial Institute," Address to visiting Hungarian Judges, 8 June 1994, (unpublished) at pp. 1 and 4.
4. Jack B. Weinstein, "Learning, Speaking and Acting: What are the Limits for Judges?" (1994) 77 *Judicature* 322 at pp. 322-3.
5. *Touchstones for Change: Equality, Diversity and Accountability*, Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession (the Wilson Report), (Ottawa: Canadian Bar Association, 1993) Recommendation 10.6, at p. 192.
6. Letter from Mr. Justice André Brossard, President of the Canadian Judges Conference, to Cecilia Johnstone, President of the Canadian Bar Association, 11 January 1994.
7. *British Columbia Court of Appeal Annual Report 1993*, Report on the Court of Appeal by Chief Justice McEachern, at p. 9.
8. *Globe & Mail*, 26 August 1993.
9. *Ibid.* Kim Campbell, the former minister of justice, had stated that judicial education imposed by the government "would be a breach of judicial independence, an unwarranted interference by the executive," *Lawyers Weekly*, 4 December 1992. Allan Rock later stated in a speech to the Canadian Judges Conference at the 1994 C.B.A. Annual Meeting, 23 August 1994, that: "The approach that I prefer is to encourage the judiciary to take charge of such obligations for itself."
10. Recommendation 10.6, as passed by the Canadian Bar Association at its 1994 Mid-Winter Meeting.
11. *Touchstones for Change*, at p. 191.
12. *Law Times*, 28 February 1994.
13. Canadian Judges Conference, "Summary of Recommendations of the Independence of the Judiciary Committee," 11 January 1994, (unpublished) at p. 5.
14. *Law Times*, 11 April 1994.
15. Chief Justice Catherine A. Fraser, "Access to Justice," Address to the Canadian Bar Association Mid-Winter Meeting, Jasper, 20 February 1994, (unpublished) at p. 4.

Chapter 8

2. NATIONAL JUDICIAL INSTITUTE AND OTHER ORGANIZATIONS

1. Background material on the National Judicial Institute can be found in the report by Mr. Justice W.A. Stevenson, *Towards the Creation of a National Judicial Education Service for Canada* (Ottawa: Canadian Judicial Centre Project, 1986); W. Stevenson, "The Founding of the Canadian Judicial Centre" in W. Kaplan and D. McRae, *Law, Policy, and International Justice* (McGill-Queen's Press, 1993) at p. 481; the National Judicial Institute, *Annual Report 1992-1993*; Rosalie Abella J.A., David Kirby, and Robert Sharpe, *National Judicial Institute External Evaluation* (1992); Judge Dolores Hansen, "National Judicial Institute Offers Wealth of Resources", *National*, May 1994, at p. 9; P. H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 185-89.
2. See the Stevenson Report.
3. *Ibid.*, at p. i.
4. *Ibid.*, at p. ii.
5. *Ibid.*, at p. 18.
6. Judge Dolores Hansen from the Provincial Court of Alberta was appointed Executive Director on 1 July 1993. A part-time Associate Director, Madam Justice Louise Charron of the Ontario Court of Justice (General Division), was appointed 6 June 1994.
7. See "National Judicial Institute Intensive Study Program: Evaluation Report", prepared by Dr. David Kirby, July, 1994.
8. National Judicial Institute Annual Report 1992-3, at p. 2. See also, "Standards for Judicial Education in Canada," prepared by the National Judicial Institute, October 1992; Abella, Kirby and Sharpe, *National Judicial Institute External Evaluation* (1992); and "The National Judicial Institute: Towards the Year 2000," November 1993.
9. Chief Justice Antonio Lamer, Address to the Canadian Judicial Conference, 20 August 1994, at pp. 11-12.
10. See Section 7 of the chapter on discipline in this Report for a discussion of the role played by the chief justices before the creation of the Canadian Judicial Council.
11. Stevenson Report, Appendix E. See also, D. C. McDonald, "The Role of the Canadian Institute for the Administration of Justice in the Development of Judicial Education in Canada" in W. Kaplan and D. McRae, *Law, Policy, and International Justice* (McGill-Queen's Press, 1993) at p. 455.
12. Chief Justice Howland prepared a report for the Canadian Judicial Council in 1982; following this report the CJC asked Associate Chief Justice Hugessen to recommend a method for putting the Howland report into practice. See the Stevenson Report, at p. 2.
13. Stevenson Report, Appendix E. A report on education had been prepared by then Judge Albert Gobeil in 1980, and by then Judge Guy Goulard in 1983: see Stevenson Report, at pp. 1-2.
14. Letter from Judge Pamela Thomson dated 19 April 1995.

15. Norma Juliet Wikler, *Educating Judges About Aboriginal Justice and Gender Equality: The Western Workshop Series 1989, 1990, 1991*, An Evaluation Study Report, Submitted to the Department of Justice, Canada, December, 1991, at p. 65. See also, Judge Gerald Seniuk, "Training Centre for Judges Tackles Sensitive Social Issues," *National*, October 1993, at p. 8.

Chapter 8

3. CONCLUSION

1. *Report of the British Royal Commission on Criminal Justice* (London, 1993), at p. 140. In 1991 the Judicial Studies Board, set up in 1978, established an Ethnic Minorities Advisory Committee, the majority of whose members are members of ethnic minorities: see *Judicial Studies Board Report for 1987-1991* (London: HMSO, 1992) at p. 3. See also the *First Annual Report of the Ethnic Minorities Advisory Committee* (Judicial Studies Board, 1992) and the *Second Annual Report of the Ethnic Minorities Advisory Committee* (Judicial Studies Board, 1994).
2. See generally, Martin Partington, "Training The Judiciary in England and Wales: the Work of the Judicial Studies Board" (1994) 13 *Civil Justice Quarterly* 319; Andrew Ashworth, *Sentencing* (London: Weidenfeld and Nicolson, 1992) at pp. 49 *et seq.*
3. Letter dated 4 May 1995 from Rod Wacowich, Assistant Deputy Minister, Alberta.
4. Letter from Dean Lynn Smith to Chief Justice Catherine A. Fraser, 20 July 1994, at pp. 4-5.
5. National Judicial Institute, 5 *Bulletin* December 1992, at p. 3. The Canadian Judicial Council's Judicial Education Committee endorsed the recommendation: see C.J.C. *Annual Report 1993* at p. 7. See also, The National Judicial Institute: Towards the Year 2000, (November, 1993) at p. 12.
6. The National Judicial Institute: Towards the Year 2000, at p. 10.
7. *Ibid.*, at p. 6.
8. P. H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 111 and 186; E. A. Tollefson, "The System of Judicial Appointments: A Collateral Issue" (1971) 21 *U. of Toronto L.J.* 162.
9. *Lawyers Weekly*, 4 December 1992.

CHAPTER NINE: ADMINISTERING THE COURT SYSTEM

Chapter 9

1. INTRODUCTION

1. See sections 9 and 10 of this chapter.
2. See the Joint Committee on Court Reform, *Report on Ontario Court Administration*, a submission to the Attorney General of Ontario by the Advocates Society, Canadian Bar Association — Ontario Branch, County of York Law Association, Criminal Lawyers' Association, and Law Society of Upper Canada (30 June 1992) at p. 2.
3. See Jules Deschênes, *Masters in their own House: A study on the Independent Judicial Administration of the Courts* (Ottawa: Canadian Judicial Council, 1981) at p. 22.

4. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
5. *Valente* (No. 2) (1983) 2 C.C.C. (3d) 417 at 433 (O.C.A.).
6. *Valente*, (S.C.C.).
7. *Ibid.*, at p. 219 C.C.C.
8. *Ibid.*, at p. 220 C.C.C.
9. Jules Deschênes, *Masters in their own House*.
10. *Valente* (S.C.C.) at p. 219 C.C.C.
11. *Ibid.*, at p. 221 C.C.C.
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*, at p. 222 C.C.C.
15. *Beauregard v. Canada* (1986) 30 D.L.R. (4th) 481 at 491 and 494, [1986] 2 S.C.R. 56.
16. *MacKeigan v. Hickman* (1989) 50 C.C.C. (3d) 449 at 465, [1989] 2 S.C.R. 796.
17. *Ibid.*, at pp. 465-6.
18. Garry Watson, "The Judges and Court Administration" in Allen Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall, 1976) at p. 184. See also *Report of the Ontario Courts Inquiry* (the Zuber Report) (Toronto: Queen's Printer, 1987) at p. 157. Even one's physical health can be affected by the degree to which one is in control of what one does: see generally, the Fall 1994 issue of *Daedalus*, and particularly p. 212.
19. David Osborne and Ted Gaebler, *Reinventing Government* (New York: Plume, 1993) at p. 259. There is an extensive literature on this subject. Recent materials include: Brian Evans and Donald Fischer, "A Hierarchical Model of Participative Decision-Making, Job Autonomy, and Perceived Control" (1992) 45 *Human Relations* 1169; Richard Kearney and Steven Hays, "Labor-Management Relations and Participative Decision-Making: Toward a New Paradigm" (1994) 54 *Public Admin. Review* 44; Jon Katzenbach and Douglas Smith, *The Wisdom of Teams: Creating the High-Performance Workplace* (Boston: Harvard Business School Press, 1993); Mark Barenberg, "Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production" (1994) 94 *Columbia L.R.* 753; H.J. Arnold, D.C. Feldman and G. Hunt, *Organizational Behaviour: a Canadian Perspective*, (Toronto: McGraw-Hill, 1992) at pp. 103-122.

Chapter 9

2. THE FEDERALLY ESTABLISHED COURTS

1. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, set out in R.S.C. 1985, App. II.
2. Supreme and Exchequer Court Act, Stat. Can. 1875, c. 11.
3. Federal Court Act, Stat. Can. 1970-71-72, c. 1.
4. Supreme and Exchequer Court Act, Stat. Can. 1875, c. 11.

5. Tax Court of Canada Act, Stat. Can. 1980-81-82-83, c. 158.
6. Judges Act, R.S.C. 1985, c. J-1, ss. 72-78. See also, the Supreme Court Act, R.S.C. 1985, c.S-26; Federal Court Act, 1985, c. F-7; Tax Court of Canada Act, 1985, c. T-2.
7. R.S.C. 1985, c. F-11, amended by Stat. Can. 1992, c. 1, s. 71.
8. Stat. Can. 1976-77, c. 25, s. 17.
9. *House of Commons Debates* (5 May 1977) at p. 5318. Two years later, the High Court of Australia achieved substantial autonomy to run its own affairs. Its registrar is a cabinet appointment, but on the nomination of the Court itself. Moreover, its budget is submitted directly to the Minister of Finance, not the Minister of Justice. See Jules Deschênes, *Masters in their own House: A study on the Independent Judicial Administration of the Courts* (Ottawa: Canadian Judicial Council, September, 1981) at pp. 54-56.
10. Stat. Can. 1976-77, c. 25, s. 17, now Judges Act, R.S.C. c. J-1, s. 75.
11. Stat. Can. 1976-77, c. 25, s. 20, now Supreme Court Act, R.S.C., c. S-26, ss. 15, 16 and 17.
12. Stat. Can. 1976-77, c. 25, s. 17, now Judges Act, R.S.C., c. J-1, s. 76(1).
13. See Deschênes Report, at pp. 75-76. The Federal Court Act, R.S.C., c. F-7, s. 46 gives the Court power over rules, but approval by Cabinet is required.
14. Report of the Canadian Bar Association Special Committee, *The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at p. 51.
15. *Ibid.*, at pp. 51-52.
16. R.S.C. 1985, c. F-11.
17. R.S.C. 1985, c. P-33.
18. Deschênes Report, at p. 75; see generally, pp. 71-75.
19. Internal Working Document, "The Administrative Independence of the Supreme Court of Canada," (March, 1986), prepared by the Registrar of the Supreme Court, at p. 55.
20. Constitution Act, 1867, ss. 53 and 54.
21. Address by the Right Honourable Brian Dickson to the Canadian Bar Association Annual Meeting, August, 1985.
22. Internal Document, "A Description of the Administrative Environment of the Supreme Court of Canada" (June 1991), prepared by the Registrar of the Supreme Court, at p. 2.
23. *Ibid.*, at p. 5.
24. R.S.C. 1985, c. P-33.
25. R.S.C. 1985, c. P-35.
26. Supreme Court Act, R.S.C. 1985, c. S-26, s. 13.

27. High Court of Australia Act 1979, Commonwealth of Australia, No. 137 of 1979, s. 18; See also the South Australian Courts Administration Act 1993, South Australia, No. 11 of 1993, s. 16, in which the Administrator is appointed with the consent of the Judicial Council.
28. Supreme Court Act, R.S.C. 1985, c. S-26, s. 15.
29. Remarks of the Right Honourable Antonio Lamer to the Conference "Open Justice", Canadian Institute for the Administration of Justice, (Ottawa: 13 October 1994) at p. 7.

Chapter 9

3. THE PROVINCES AND TERRITORIES

1. Joint Committee on Court Reform, *Report on Ontario Court Administration*, a submission to the Attorney General of Ontario by the Advocates Society, Canadian Bar Association — Ontario Branch, County of York Law Association, Criminal Lawyers' Association and Law Society of Upper Canada (30 June 1992) at p. 2.
2. *Report of the Quebec Task Force on Administrative Autonomy of the Courts of Justice* (Quebec: 2 December 1993), at p. 1: English translation prepared by Canadian Judicial Council.
3. Joint Committee on Court Reform, *Report on Ontario Court Administration*, at p. 5.
4. P.S. Millar & C. Baar, *Judicial Administration in Canada*, (Montreal: McGill-Queen's U. P. and Institute of Public Administration of Canada, 1981) at p. 51. See also T. E. Kirk, "Control of the Courts: An Examination of Executive and Judicial Responsibilities for the Administration of Justice in Ontario" (unpublished M.P.A. Thesis, Queen's University, 1993) at p. 5.
5. Contrast Joint Committee on Court Reform, *Report on Ontario Court Administration*, at p. 25 with T. E. Kirk's 1993 M.P.A. thesis, "Control of the Courts", at p. 49.
6. Estimates 1995-96, Part III.
7. *Report of the Attorney-General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*. (The Martin Report) (Toronto: Ministry of the Attorney General, 1993).
8. Territorial Court Act, R.S.Y. 1986, c. 169, s. 56.
9. See Senator Arthur Meighen (the former Prime Minister), in the *Senate Debates* (24 May 1932), at p. 457: "a judge is in no sense under the direction of the Government...The judge is in a place apart."
10. Court Services Executive Board document, dated 25 August 1992.
11. Courts of Justice Statute Law Amendment Act, S.O. 1994, c. 12, s. 26, amending s. 73(2) & (3) of the Courts of Justice Act, R.S.O. 1990, c. 43 which had been introduced by S.O. 1989, c. 70, s. 18.
12. *Ibid.*, s. 28, amending s. 75(1) & (2) of the Courts of Justice Act, R.S.O. 1990, c. 43, which had been introduced by S.O. 1989, c. 70, s. 20.
13. *Report of the Ontario Courts Inquiry* (Zuber Report) (Toronto: Queen's Printer, 1987) at pp. 158 and 164-5.

14. See the addresses, "Judicial Administration and an Independent Judiciary," given in Winnipeg to the Canadian Bar Association, 31 August 1976 and to the Victoria Bar, 30 September 1976 by N. T. Nemetz, Chief Justice of the Supreme Court of British Columbia, cited on p. 15 of the Joint Committee on Court Reform, *Report on Ontario Court Administration*.
15. Miscellaneous Statutes (Court Rules) Amendment Act, S.B.C. 1976, c. 33, s. 117. See also the Supreme Court Act, S.B.C. 1989, c. 40, s. 10.
16. Attorney General Statutes Amendment Act, 1979, S.B.C. 1979, c. 2, s. 16; see also Court of Appeal Act, S.B.C. 1982, c. 7, s. 31.
17. Attorney General Statutes Amendment Act, 1980, S.B.C. 1980, c. 1, s. 23; see also Supreme Court Act S.B.C. 1989, c. 40, s. 10(3).
18. B.C. Report to the Federal/Provincial/Territorial Working Group on Judicial Independence, 1994, at p. 3.
19. See T. E. Kirk, "Control of the Courts", at p. 24; see also Millar and Baar, *Judicial Administration in Canada*, at p. 51.
20. Mr. Justice Guy J. Kroft, *Report for Joint Liaison Committee for Judicial Support* (December 1989), Recommendation 7, at p. 9.
21. See Courts of Justice Act, R.S.Q. c.T-16, s.282.1 and An Act Respecting the Ministère de la Justice, R.S.Q., c. M-19, s. 3, the latter of which provides that the Minister of Justice "exercises superintendence over all matters connected with the administration of justice in Québec except those assigned to the Minister of Public Security."
22. *Report of the Québec Task Force on Administrative Autonomy of the Courts of Justice* (Quebec: 2 December 1993) at p. 19.
23. *Ibid.*, at p. 20.
24. *Ibid.*, at p. 25.
25. *Ibid.*
26. *Ibid.*, at pp. 26-27.
27. *Ibid.*, at p. 27.
28. *Ibid.*
29. *Ibid.*, at p. 24.
30. Court Services Executive Board document, dated 25 August 1992.
31. Alberta Court of Appeal, "The Alberta Court of Appeal in the 21st Century," 14 September 1993, at p. 9.
32. Courts of Justice Act, R.S.O. 1990, c. C.43, s. 71. See also the Zuber Report, at p. 135.
33. *Ibid.*, s. 76.
34. *Ibid.*, s. 78.

35. Memorandum of Understanding between the Attorney General of Ontario and the Chief Judge of the Ontario Court (Provincial Division) (15 June 1993), clause 1.1.
36. *Ibid.*, clause 1.5. The language suggests that it will continue indefinitely until amended, but apparently this is not the intention.
37. *Ibid.*, clause 2.2.
38. *Ibid.*
39. *Ibid.*, clause 2.3.
40. *Ibid.*
41. *Ibid.*, clause 2.4.
42. *Ibid.*, clause 3.2.
43. *Ibid.*, Appendix A.
44. *Ibid.*, clause 4.1.
45. *Ibid.*, clause 5.1.
46. S.B. Linden, in "Self-Government and the Judiciary" (1993) 27 *Law Society Gazette* at p. 73 writes: "in order to effectively manage our court system, administrative control of the judiciary and its resources—the judges and the court staff and the people who support them—should properly be under the control of the judiciary, not the Ministry."

Chapter 9

4. THE DESCHENES REPORT

1. Jules Deschênes, *Masters in their own House: A study on the Independent Judicial Administration of the Courts*, (Ottawa: Canadian Judicial Council, 1981).
2. *Ibid.*, at p. 4. See also the "Statement of Principles on the Need for Independence in Judicial Administration" adopted by the National Conference of Court Administrators in 1965, and by the Conference of Chief Justices in Montreal in 1966, discussed in Internal Working Document "The Administrative Independence of the Supreme Court of Canada" (March, 1986), prepared by the Registrar of the Supreme Court, at p. 3.
3. *Ibid.*, at p. 11.
4. *Ibid.*, at p. 13.
5. *Ibid.*, at p. 21.
6. *Ibid.*, at p. 22.
7. *Ibid.*, at p. 161.
8. Universal Declaration on the Independence of Justice (The Montreal Declaration), (Montreal, 1983), Art. 2.40, discussed in Chapter 1, Section 5.

9. Joint Committee on Court Reform, *Report on Ontario Court Administration*, a submission to the Attorney General of Ontario by the Advocates Society, Canadian Bar Association — Ontario Branch, County of York Law Association, Criminal Lawyers' Association and Law Society of Upper Canada (30 June 1992) at p. 16.
10. Report of the Canadian Bar Association Special Committee, *The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985) at p. 40.
11. See Internal Memorandum by the Executive Secretary of the Canadian Judicial Council, "Independence in Court Administration" (October, 1991).
12. Deschênes Report, at p. 176-178.
13. *Ibid.*, at p. 182.
14. *Ibid.*, at p. 200.
15. "Independence in Court Administration" (October, 1991), at p. 1; see also documents appended to the memorandum.
16. Draft Report prepared by McEachern C.J., 14 January 1992.
17. *Ibid.*, at p. 2.
18. *Ibid.*, at p. 15.
19. *Ibid.*, at p. 16.
20. *Ibid.*, at p. 17.
21. *Ibid.*, at p. 24.
22. *Ibid.*, at p. 26.
23. *Ibid.*, at p. 25.

Chapter 9

5. ONTARIO PROPOSALS

1. *Royal Commission Inquiry into Civil Rights* (the McRuer Report), Report Number 1, Vol. 2, (Toronto: Queen's Printer, 1968). See also Ontario Ministry of the Attorney General, *White Paper on Court Administration* (October, 1976) at p. 6; Ontario Ministry of the Attorney General, *Report of the Ontario Courts Inquiry* (the Zuber Report) (Toronto: Queen's Printer, 1987) at p. 27.
2. Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (1973) at p. xiii.
3. *Ibid.*, at pp. 6-7.
4. *Ibid.*, at p. 17.
5. *Ibid.*, at p. 9.
6. *Ibid.*, at p. 22.
7. *Ibid.*, at p. 28.

8. *Ibid.*
9. *Report on Administration of Ontario Courts*, at p. 28.
10. *Ibid.*, at pp. 24 -25.
11. See Zuber Report at p. 144; see also Ontario, *White Paper on Court Administration*, at pp. 7-9; P. S. Millar & C. Baar, *Judicial Administration in Canada*, (Montreal: Institute of Public Administration of Canada, 1981) at p. 51.
12. *White Paper*, at p. 8.
13. *Ibid.*
14. Zuber Report at p. 144.
15. *White Paper*, at p. 8.
16. *Ibid.*, at pp. 8-9.
17. *Ibid.*, at p. 12.
18. *Ibid.*
19. *Ibid.*, at pp. 16-17.
20. *Ibid.*, at 18.
21. See Zuber Report at pp. 154-5; see also, Ian Greene, "The Politics of Judicial Administration—the Ontario Case", (Ph.D thesis, U. of Toronto, 1983) at p. 15, and "The Politics of Court Administration of Ontario" (1982) 2 *Windsor Yearbook of Access to Justice* 124.
22. See Joint Committee on Court Reform, *Report on Ontario Court Administration*, a submission to the Attorney General of Ontario by the Advocates Society, Canadian Bar Association — Ontario Branch, County of York Law Association, Criminal Lawyers' Association and Law Society of Upper Canada (30 June 1992) at p. 15.
23. Ontario Ministry of the Attorney General, *Report of the Ontario Courts Inquiry* (the Zuber Report) (Toronto: Queen's Printer, 1987).
24. See generally, C. Baar, "The Zuber Report: The Decline and Fall of Court Reform in Ontario" (1988), 8 *Windsor Yearbook of Access to Justice*, 105 at pp. 142 *et seq.*
25. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
26. Zuber Report, at p. 149.
27. *Ibid.*
28. *Ibid.*, at p. 150.
29. *Ibid.*, at p. 151.
30. *Ibid.*
31. *Ibid.*

32. *Ibid.*, at p. 156.
33. *Ibid.*, at pp. 157-8.
34. *Ibid.*, at p. 158.
35. C. Baar, "The Zuber Report: The Decline and Fall of Court Reform in Ontario" (1988) 8 *Windsor Yearbook of Access to Justice*, 105 at p. 112.
36. Joint Committee on Court Reform, *Report on Ontario Court Administration*, (1992) at pp. 1-2.
37. *Ibid.*, at p. 3.
38. *Ibid.*, at p. 2.
39. *Ibid.*, at p. 3.
40. *Ibid.*, at p. 5.
41. *Ibid.*, at pp. 11-12.
42. *Ibid.*, at p. 11.
43. *Ibid.*, at p. 21.
44. *Ibid.*, at p. 20.
45. *Ibid.*, at p. 21.
46. *Ibid.*, at p. 22.
47. *Ibid.*, at pp. 23-26.

Chapter 9

6. QUEBEC PROPOSALS

1. Bill 144, An Act to Establish the Conseil d'administration des Tribunaux Judiciaires, 2nd Sess., 34th Leg., Quebec, 1993.
2. Report of the Quebec Task Force "Administrative Autonomy of the Courts of Justice in Quebec" (2 December 1993) (translated from the French by the Translation Bureau for the Canadian Judicial Council).
3. Charles Tremblay, Rapport préliminaire sur la faisabilité de l'indépendance administrative de la magistrature [Preliminary Report on the Feasibility of the Administrative Independence of the Judiciary] (Quebec Judicial Council, 1985), discussed in the Report of the Quebec Task Force, at pp. 46-48.
4. See section 3 of this chapter.
5. The Report of the Quebec Task Force, at pp. 46-48.
6. Quebec Department of Justice, La gestion des tribunaux québécois: étude diagnostique des rapports entre la magistrature et les services judiciaires. [Management of the Quebec Courts: Analysis of the Relationship between the Judiciary and Judicial Services.] (The Proulx Report) (1990), discussed in the Report of the Quebec Task Force, at pp. 48-51.

7. The English quotations are from the translated version of the Report of the Quebec Task Force, at p.48.
8. *Ibid.*, at p. 49.
9. *Ibid.*
10. *Ibid.*, at p. 50.
11. *Ibid.*
12. Les Actes du Sommet de la Justice, La justice: une responsabilité à partager [Proceedings of the Justice Summit, Justice: Sharing Responsibility] (Quebec City: Department of Justice, 1993) at p. 597. See also Report of the Quebec Task Force Report, at pp. 3 and 51-52.
13. Report of the Quebec Task Force, at p. 3.
14. *Ibid.*, at p. 52.
15. *Ibid.*, at pp. 52-53.
16. *Ibid.*, at 54.
17. *Ibid.*, at pp. 54-55.
18. *Ibid.*, at pp. 56-57.
19. *Ibid.*, at p. 57.
20. Bill 144, An Act to Establish the Conseil d'Administration des Tribunaux Judiciaires.
21. *Ibid.*, s. 157.12.
22. See generally, the remarks of Chief Justice L.A. Poitras, delivered to the Lord Reading Society, 26 May 1994, "Should Judges Mind Their Own Business?"

Chapter 9

7. ENGLAND

1. See generally, Lord Mackay, "The Administration of Justice: The Courts" *Hamlyn Lectures 1993*, Lecture 2; see also, J. Rozenberg, *The Search for Justice, An Anatomy of the Law* (London: Hodder & Stoughton, 1994) at pp. 52-53; J. Donaldson and I. R. Scott, "Court Administration in England and Wales", Paper presented to the Australian Institute of Judicial Administration, Seminar on Constitutional and Administrative Responsibilities for the Administration of Justice: The Partnership of Judiciary and Executive, August, 1985.
2. Prior to April 1992, they were supervised by the Home Office. See E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law*, 11th ed., (London: Longman, 1993) at p. 398.
3. Donaldson and Scott, "Court Administration in England and Wales" at p. 63.
4. United Kingdom, *Report of the Royal Commission on Assizes and Quarter Sessions* (1969).
5. N. Browne-Wilkinson, "The Independence of the Judiciary in the 1980s" [1988] *Public Law* 44 at p. 46. This article is the text of the second Francis Mann Lecture, delivered in the Old Hall, Lincoln's Inn, London on 17 November 1987.

6. See section 5 of this chapter.
7. See the *Report of the Ontario Courts Inquiry* (the Zuber Report) (Toronto: Queen's Printer, 1987). See also the Designation of Regions, R.R.O. 1990, Reg. 186.
8. I. R. Scott, "Problems in Court Structures and Processes" (1991) 44 *Current Legal Problems* 15 at p. 35. See also, I. R. Scott, "The English Civil Justice Review: Implementation and Further Reform" in I. R. Scott, ed., *International Perspectives on Civil Justice* (London: Sweet and Maxwell, 1990) at p. 103.
9. *Ibid.*
10. Browne-Wilkinson, "The Independence of the Judiciary in the 1980s." See the reply by Lord Hailsham, "The Office of Lord Chancellor and the Separation of Powers" (1989) 8 *Civil Justice Quarterly* 308.
11. *Ibid.*, at p. 45; See also, Sir Anthony Mason "Judicial Independence and the Separation of Powers — Some Problems Old and New" (1990) 24 *U.B.C.L.R.* 345 at pp. 347-348.
12. *Ibid.*, at pp. 47, 50 and 52.
13. *Ibid.*, at p. 54.
14. Donaldson and Scott, "Court Administration in England and Wales."
15. Sir Francis Purchas, "The Constitution in the Market Place" [1993] *New L.J.* 1604 at pp. 1607 and 1609. See also Purchas, "What is happening to judicial independence?" [1994] *New L.J.* 1306.
16. *Ibid.*, at p. 1609.
17. Browne-Wilkinson, "The Independence of the Judiciary in the 1980s", at pp. 53-54.
18. See, e.g., the Wood affair: Sir Francis Purchas, "Lord Mackay and the Judiciary" (1994) *New Law Journal* 527; Andrew MacKinlay, "A Law Unto Himself?" *The Times* (26 April 1994); David Pannick, "Politics and Judges must be Separated" *The Times* (10 May 1994); *House of Lords Debates*, 27 April 1994, Col. 751-804.
19. Lord Mackay, "The Lord Chancellor in the 1990s" (1991) 44 *Current Legal Problems* 241 at p. 254.
20. *Ibid.*, at p. 258.
21. *Ibid.*, at p. 255.
22. *Ibid.*, at p. 247.
23. *Ibid.*
24. *Ibid.*
25. Lord Mackay, "The Administration of Justice: The Courts" *Hamlyn Lecture 1993*, Transcript of Lecture 2 at p. 23.
26. *Ibid.*
27. *Ibid.*, at p. 24.

28. The initiative was said to have been influenced, in part, by experience in New Zealand and by D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Plume, 1993). See also N. Lewis, "Reviewing Change in Government: New Public Management and Next Steps" (1994) 5 *Public Law* 105.
29. U.K., *The Citizen's Charter, Second report: 1994*, Presented to Parliament by The Prime Minister and the Chancellor of the Duchy of Lancaster (London: H.M.S.O., 1994).
30. See generally, Lord Mackay, "The Administration of Justice: The Courts" *Hamlyn Lecture 1993*, Lecture 2; see also, J. Rozenberg, *The Search for Justice: An Anatomy of the Law*, at p. 52-53.
31. Lord Mackay, "The Administration of Justice: The Courts", at pp. 18-19.
32. *Ibid.*, at p. 17.
33. *Ibid.* See also Robert Stevens, "On being nicer to James and the children" [1994] *New L.J.* 1620 at p. 1621: "This [the 'Next Steps' agency] ought to be welcome news to the judiciary, for the courts are being taken from under the 'heel' of the Lord Chancellor and put into an agency into which the judges will have considerable input."
34. Draft Framework Document, Current Working Draft (13 April 1994) at p. 2.
35. The Court Service, Framework Document, 1995, at p. 2.
36. *Ibid.*, at p. 20.

Chapter 9

8. AUSTRALIA AND NEW ZEALAND

1. Referring to Queensland: R. E. McGarvie J., "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" (1992) 1 *J. Jud. Admin.* 236 at p. 287. For other comments on Queensland, see McGarvie at pp. 254-7 and Marks J., "Judicial Independence" (1994) 68 *Australian Law Journal* 173 at pp. 179-180.
2. High Court of Australia Act 1979, Commonwealth of Australia, Act. No. 137 of 1979, amended by Law and Justice Legislation Amendment, No. 13, 1994.
3. *Ibid.*, s.17.
4. *Ibid.*, s.17(5).
5. *Ibid.*, s.18.
6. *Ibid.*, s.19.
7. McGarvie, "The Ways Available to the Judicial Arm", at p. 257.
8. Supreme Court Act, R.S.C. 1985, c.S-26, s.13.
9. High Court of Australia Act 1979, c. 137, s.18.

10. Supreme Court Act, R.S.C. 1985, c.S-26, s.15.
11. High Court of Australia Act 1979, s.17(2).
12. Courts and Tribunals Administration Amendment Act 1989, Commonwealth of Australia, No. 157 of 1989. See McGarvie J., "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *J. Jud. Admin.* 3 at pp. 28-9; see also T. W. Church and P.A. Sallmann, *Governing Australia's Courts* (Victoria: Australian Institute of Judicial Administration, 1991) at pp. 41 *et seq.*
13. Hansard (1 November 1989), at p. 2269, discussed in Church and Sallmann, *Governing Australia's Courts* at p. 41.
14. McGarvie, "The Foundations of Judicial Independence", at p. 29.
15. Church and Sallmann, *Governing Australia's Courts*, at p. 41.
16. Sir Harry Gibbs, "Comment: The High Court Today" (1983) 10 *Sidney L.R.* 1 at pp. 3-4; see also Church and Sallmann, at p. 12.
17. A. Mason, "Judicial Independence and the Separation of Powers—Some Problems Old and New" (1990) 24 *U.B.C.L.R.* 345 at p. 349, and (1990) 13 *U.N.S.W.L.J.* 173 at p. 177. A similar suggestion was made by Chief Justice Mason in an address, "The State of the Judicature" to the 28th Australian Legal Convention in Hobart on 30 September 1993; See also McGarvie, "The Ways Available to the Judicial Arm", at p. 259.
18. Courts Administration Act 1993, South Australia, No. 11 of 1993. See generally B.M. Debelle, "Current Topics, Independent Court Administration" (1993) 67 *Aust. L.J.* 245 *et seq.*
19. Courts Administration Act 1993, s. 17.
20. See section 6 of this chapter.
21. Courts Administration Act 1993, s.10.
22. *Ibid.*
23. See Debelle, "Current Topics", at p. 247.
24. Courts Administration Act 1993, s.15(1).
25. *Ibid.*, s.11(2)(c).
26. *Ibid.*, ss.16(4) and 16(5).
27. *Ibid.*, s.25(1).
28. *Ibid.*, s.25(3).
29. *Ibid.*, s.25(4).
30. *Ibid.*, s.29.
31. See Church and Sallmann, *Governing Australia's Courts*, at pp. 31 *et seq.*
32. *Ibid.*, at p. 28.
33. See section 7 of this chapter.

34. See Church and Sallmann, *Governing Australia's Courts* at p. 31, note 2; see also, S. Shetreet, "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986" (1987) 10 *U.N.S.W.L.J.* 4 at p. 9; M. D. Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 *U.N.S.W.L.J.* 187 at pp. 208-9.
35. See L. J. King, "Minimum Standards of Judicial Independence" (1984) 58 *Aust. L.J.* 340; See also McGarvie, "The Foundations of Judicial Independence" at pp. 30-31; see also Nicholson "Judicial Independence and Accountability: Can They Co-exist?" (1993) 67 *Australia Law J.* 404 at p. 432. See also the influential *State of Victoria Civil Justice Report* (Chief Justice John Young, chair) (Victoria Government Printer, 1994).
36. Church and Sallmann, *Governing Australia's Courts*, at p. 5, note 13; see also speech by the Attorney General, C. J. Sumner, at the opening of the State Courts Administration Authority, 29 June 1993.
37. Sumner, *ibid.*, at p. 6.
38. Church and Sallmann, *supra*.
39. *Ibid.*, at p. 65.
40. *Ibid.*, at p. 73.
41. *Ibid.*, at p. 74.
42. Sumner, at opening of the State Courts Administration Authority, at p. 7.
43. *Ibid.*
44. *Ibid.*, at p. 8.
45. *Ibid.*
46. *Ibid.*, at p. 9.
47. In an address to the 1993 New England Law Society Conference in Wellington, T. Eichelbaum, Chief Justice of New Zealand, stated: "Judges here are yet to be convinced of the advantages", speech published in "Judicial Independence—Fact or Fiction?" [1993] *N.Z.L.J.* 90 at p. 91. See also R. G. Hammond, "The Judiciary and the Executive" (1991) 1 *J. of Judicial Administration* 88; and see Geoffrey Palmer, a former Attorney General and Prime Minister, and now a professor at the University of Iowa, who states: "no government is going to surrender decisions about levels of funding and methods of administering a significant quantity of government expenditure." See G. Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in B. D. Gray and R. B. McClintock, eds., *Courts and Policy—Checking the Balance* (New Zealand: Brookers, 1995, forthcoming).
48. Church and Sallmann, *Governing Australia's Courts*, at pp. 15 *et seq*; see also McGarvie, "The Foundations of Judicial Independence", at p. 32, who writes that the Supreme Court of Victoria is to an increasing extent administering its own budget.
49. Church and Sallmann, *ibid.*, at p. 29.
50. *Ibid.*, at pp. 29-30.
51. *Ibid.*, at p. 64, quoting P. S. Millar and C. Baar, *Judicial Administration in Canada* (Montreal: McGill-Queen's U.P. and Institute of Public Administration of Canada, 1981) at p. 51.

52. King, Address at opening of the Courts Administration Authority, 29 June 1993, pp. 9-10.

Chapter 9

9. U.S. FEDERAL COURTS

1. 28 U.S.C. ss. 604-612. See R.R. Wheeler, *Origins of the Elements of Federal Court Governance* (Washington: Federal Judicial Center, 1992) at pp. 16-17.
2. *Ibid.*, at pp. 8-9; see also R.R. Wheeler, "Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center" (1988) 51 *Law and Contemp. Prob.* 31 at p. 35; P. G. Fish, *The Politics of Federal Judicial Administration* (Princeton: Princeton University Press, 1973).
3. R. R. Wheeler, *Judicial Administration: Its Relation to Judicial Independence* (Virginia: National Center for State Courts, 1988) at p. 19.
4. C. Eliot, M. Storey, L. Brandeis, A. Rodenbeck and R. Pound, *Preliminary Report on Efficiency in the Administration of Justice* (1914), as quoted in Wheeler, *Judicial Administration*, at p. 27.
5. Wheeler, *Judicial Administration*, at p. 30, and *Origins of the Elements of Federal Court Governance*, at p. 16.
6. Wheeler, *Judicial Administration*, at p. 30.
7. *Ibid.*
8. See generally, Wheeler, *Origins of the Elements of Federal Court Administration*; P. G. Fish, *The Politics of Federal Judicial Administration*; D. J. Meador, "The Federal Judiciary and its Future Administration" (1979) 65 *Virginia Law Review* 1031.
9. See Wheeler, *Origins of the Elements of Federal Court Governance*, at p. 16.
10. 28 U.S.C., s. 331; see Wheeler, *Origins of the Elements of Federal Court Governance*, and Wheeler, "Empirical Research", at p. 34.
11. It was then called the Conference of Senior Circuit Judges.
12. See generally, H. J. Abraham, *The Judicial Process* (New York: Oxford U. Press, 1993) at p. 167.
13. Wheeler, *Origins of the Elements of Federal Court Governance*, at pp. 15-16.
14. 28 U.S.C., ss. 620-629.
15. 1994 Annual Report of the Federal Judicial Center, at p. 5.
16. See generally, Wheeler, *Origins of the Elements of Federal Court Governance*, at p. 20; Wheeler, "Empirical Research".
17. The above is drawn from G. Bermant, E. Sussman, W.W. Schwarzer and R.R. Wheeler, *Imposing a Moratorium on the Number of Federal Judges; Analysis of Arguments and Implications* (Washington: Federal Judicial Center, 1993) at pp. 35 & 45.
18. Wheeler, "Empirical Research", at p. 35.

19. 28 U.S.C., s. 332, see Wheeler, *Origins of the Elements of Federal Court Governance*, at pp. 17-19. There is also an advisory Circuit Judicial Conference in each circuit: Wheeler, *ibid.* at p. 19. See also, R. R. Wheeler and G. Bermant, *Federal Court Governance* (Washington: Federal Judicial Center, 1994) which analyses current federal court governance arrangements and alternatives to those arrangements.
20. Wheeler, *Origins of the Elements of Federal Court Governance*, at pp. 17-18.
21. See T.G. Walker and D.J. Barrow "Funding the Federal Judiciary: the Congressional Connection" (1985) 69 *Judicature* 43, on which I have drawn heavily for this description; see also P. G. Fish, *The Politics of Federal Judicial Administration*, and Carl Baar, *Separate but Subservient: Court Budgeting in the American States* (Lexington, Mass.: Lexington Books, 1975).
22. 28 U.S.C. 605.
23. Walker and Barrow, "Funding the Federal Judiciary", at p. 47.

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10. U.S. STATE COURTS

1. For this section of the Report, I have relied heavily on R.R. Wheeler, *Judicial Administration: Its Relation to Judicial Independence* (Virginia: National Center for State Courts, 1988) at pp. 30 *et seq.* See pp. 27-30 for a discussion of the rise and collapse of state judicial councils.
2. *Ibid.*, at p. 31.
3. Carl Baar, *Separate but Subservient: Court Budgeting in the American States* (Lexington, Mass.: Lexington Books, 1975).
4. R. Stout, "Planning for Unified Court Budgeting" (1986) 69 *Judicature* 205; panel discussion at American Judicature Society meeting, "Funding State and Local Courts: Increasing Demands and Decreasing Resources" (1992) 76 *Judicature* 82.
5. Harry P. Stumpf and John H. Culver, *The Politics of State Courts* (New York: Longman, 1992) at p. 29.
6. See H. B. Glaser, "Wachtler v. Cuomo: the Limits of Inherent Powers" (1994) 78 *Judicature* 12 at p. 15; see also C.Baar, *Separate but Subservient* (1975).
7. *Funding the Justice System: A Call to Action* (American Bar Association: August, 1992); See also "The Justice System Funding Crisis: What we can do about it" (1993) 32 *Judges' Journal* 6.
8. *Funding the Justice System*, at p. ii.
9. F. F. Stumpf, *Inherent Powers of the Courts: Sword and Shield of the Judiciary* (Nevada: National Judicial College, 1994).
10. Carl Baar, "Inherent Powers: Trends and Prospects", in Stumpf, *ibid.*, at p. xvii.
11. See cases cited in Glaser, "Wachtler v. Cuomo", at pp. 12-13.
12. *Commonwealth ex rel. Carroll v. Tate* 274 A.2d 193 (Pa. S.C. 1971), *cert. denied*, 402 U.S. 974 (1971). See also H.B. Glaser, "Wachtler v. Cuomo"; Comment, "State Court Assertion of Power to Determine and Demand Its Own Budget" (1972) 120 *U. Pa. L. Rev.* 1187.

13. *Commonwealth ex rel. Carroll v. Tate*, at p. 197.
14. Glaser, "Wachtler v. Cuomo", at p. 13.
15. See Baar's introduction in Stumpf, *Inherent Powers*, at pp. xxvii-xix; see also J. Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers" (1993) 52 *Maryland L.R.* 217 at pp. 227 *et seq.*
16. *Los Angeles County Bar Association v. Eu*, 979 F. 2d 697 (9th Cir. C.A., 1992); see also, Baar, *ibid.*, at pp. xxv-xxvi.
17. I have relied heavily on Glaser, "Wachtler v. Cuomo." See also, J. Jackson, "Judicial Independence."
18. Glaser, "Wachtler v. Cuomo", at p. 18.
19. Jackson, "Judicial Independence", at p. 255.
20. Glaser, "Wachtler v. Cuomo", at p. 24.
21. J. K. Powers, "Crisis in the Courts? The New York Experience" (1993) 29 *Trial* 22.
22. *Ibid.*, at pp. 24-25.
23. M. M. Lucas, "Is inadequate funding threatening our system of justice?" (1991) 74 *Judicature* 292 at p. 293.
24. Jackson, "Judicial Independence", at p. 255.
25. Wheeler, *Judicial Administration*, at p. 40.

Chapter 9

11. OTHER CANADIAN INSTITUTIONS

1. Jules Deschênes, *Masters in their own House: A Study on the Independent Judicial Administration of the Courts*, (Ottawa: Canadian Judicial Council, 1981) at p. 83.
2. *Report of the Quebec Task Force on Administrative Autonomy of the Courts of Justice*, (Quebec: 2 December 1993). English translation by the Translation Bureau at the request of the Canadian Judicial Council.
3. Joint Committee on Court Reform, *Report on Ontario Court Administration*, a submission to the Attorney General of Ontario by the Advocates Society, Canadian Bar Association — Ontario Branch, County of York Law Association, Criminal Lawyers' Association and Law Society of Upper Canada (30 June 1992).
4. Deschênes Report, at pp. 83-87.
5. *Ibid.*, at p. 83.
6. *Guide to Agencies, Boards & Commissions of the Government of Ontario 1994* (Toronto: Queen's Printer, 1994) at p. 3.
7. *Ibid.*, at pp. 4-5.
8. Deschênes Report, at pp. 86-87.

9. The Provincial Auditor Act, S.S. 1983, c. P-30.01, s. 3.
10. Audit Act, R.S.O. 1990, c.A.35, s. 4. It is perhaps surprising that the legislature allows reappointment after age 65, as this calls into question the auditor's independence.
11. *Ibid.*, s. 3.
12. Auditor General Act, R.S.Q. c.V-5.01, s. 7.
13. Auditor General Act, R.S.A. 1980, c. A-49, s. 3.
14. The Provincial Auditor Act, S.S. 1983, c. P-30.01, s.4(1). But note that s.4(2) states that the Auditor is not to be paid less than his previous year's salary.
15. Audit Act, R.S.O. 1990, c. A.35, s. 5.
16. Auditor General Act, R.S.Q. c. V-5.01, s.14.
17. Auditor General Act, R.S.C. 1985, c. A-17, s. 4(1).
18. Auditor General Act, R.S.A. 1980, c. A-49, s. 7.
19. The Provincial Auditor Act, S.S. 1983, c. P-30.01, s. 8(1).
20. *Ibid.*, s. 8(2).
21. *Ibid.*, s. 27.
22. *Ibid.*, s. 31.
23. See Legislative Assembly and Executive Council Act, R.S.S. 1978, c. L-11.1, s. 68.8(1)(a).
24. See the Ontario Legislative Assembly Act, R.S.O. 1990, c. L.10, ss. 79, 87.
25. Audit Act, R.S.O. 1990, c.A.35, s.29.
26. Auditor General Act, R.S.Q. c.V.5.01, ss.63 and 64.
27. Auditor General Act, R.S.A. 1980, c. A-49, s. 13.
28. Auditor General Act, R.S.Q. c.V.5.01, s.65.
29. Auditor General Act, R.S.C. 1985, c.A-17, s.19.
30. Ombudsman Ontario Annual Report 1993-94 at p. 49.
31. Canada Council Act, R.S.C. 1985, c. C-2.
32. Broadcasting Act, R.S.C. 1985, c.B-9.01, s.24(1).
33. Art Gallery of Nova Scotia Act, R.S.N.S. 1989, c.22, s.5.
34. Royal Ontario Museum Act, R.S.O. 1990, c.R.35, s.4.
35. *Ibid.*
36. The point is not discussed in the Deschênes Report.
37. Legal Aid Act, R.S.O. 1990, c.L-9, s.3.

38. *Ibid.*, s.9.
39. *Ibid.*, ss. 6 and 7.
40. Legal Services Society Act, R.S.B.C. 1979, c.227, s.5.
41. Bank of Canada Act, R.S.C. 1985, c. B-2, s.6.
42. *Ibid.*, ss. 5, 6 and 9.
43. See J. R. S. Prichard, ed., *Crown Corporations in Canada: the Calculus of Instrument Choice* (Toronto: Butterworths, 1983).
44. Law Reform Commission Act, R.S.C. 1985, c. L-7, repealed, 1993, c. 1, s. 34.
45. Economic Council of Canada Act, R.S.C. 1985, c.E-1, repealed, 1993, c. 1, s. 23.
46. Immigration Act, R.S.C. 1985, c. I-2; Labour Relations Act R.S.O. 1990, c. L.2; Securities Act, R.S.O. 1990, c. S.5.
47. *Guide to Agencies, Boards & Commissions of the Government of Ontario 1994* (Toronto: Queen's Printer, 1994) at pp. 208-209 and 366-368.
48. Immigration Act, R.S.C. 1985, c. I-2, ss. 58, 61.
49. See "Bias in the Justice System? Present one gives Government too much Power", *Montreal Gazette*, 30 November 1993.
50. *Ibid.*
51. See Hudson Janisch, "Independence of Administrative Tribunals: In Praise of 'Structural Heretics' " (1987) 1 *Can. J. Admin. L. and Practice* 1; Margot Priest, "Structure and Accountability of Administrative Agencies", in Law Society of Upper Canada Special Lectures, *Administrative Law*, 1992, at pp. 11 *et seq.*; Nurjehan Mawani, "The Independence of Administrative Tribunals: The Experience of the Immigration and Refugee Board", Remarks made at C.C.A.T. Conference (May, 1994); *Report on the Independence of Federal Administrative Tribunals and Agencies in Canada* (Ottawa:Canadian Bar Association, 1990) (the Ratushny Report); David Mullan, "The Impact of the Charter on Administrative Procedure", in the 1990 Pitblado Lectures, *Public Interest v. Private Rights: Striking the Balance in Administrative Law* (McGill Law School).
52. Including the Bill of Rights. I have benefited greatly from a Department of Justice paper by Judith Bellis, "Legal Requirements of Independence and Impartiality of Administrative Tribunals" (August, 1992).
53. *Alex Couture Inc. v. Canada A-G* (1991) 83 D.L.R. (4th) 597 (Que. C.A.), leave to appeal to S.C.C. denied (1992) 91 D.L.R. (4th) vii, [1992] 2 S.C.R. v.
54. *Sethi v. Canada (Minister of Employment and Immigration)* (1988) 50 D.L.R. (4th) 669, 2 F.C. 53 (F.C.T.D.); reversed (1988) 52 D.L.R. (4th) 681, [1988] 2 F.C. 552 (C.A.); *Singh v. Minister of Employment and Immigration*, (1985) 17 D.L.R. (4th) 422, [1985] 1 S.C.R. 177.
55. *Shubley* (1990) 65 D.L.R. (4th) 193 at 209, [1990] 1 S.C.R. 3. See also *Wigglesworth* (1987) 45 D.L.R. (4th) 235, 37 C.C.C. (3d) 385, [1987] 2 S.C.R. 541; and *Mohammed v. Canada (Min. of Employment and Immigration)* (1988) 55 D.L.R. (4th) 321, [1988] 2 F.C. 363 (F.C.A.).
56. [1995] 1 S.C.R. 3.

57. Hospitals could also be examined, but there the control exercised by the government tends to be greater than for universities.
58. There is, of course, also the power to pass legislation and promulgate regulations.
59. The University of Saskatchewan Act, R.S.S. 1978, c.U-6, s.56.
60. University of Regina Act, R.S.A. 1978, c.U-5, s.15.
61. *University Accountability: A Strengthened Framework. Report of the Task Force on University Accountability* (William Broadhurst, chair) (May 1993).
62. *Ibid.*, at p. 40.
63. *Toronto Star*, 8 October 1993.
64. See a similar approach in the B.C. Legal Services Society, Legal Services Society Act, R.S.B.C. 1979, c. 227, s. 5.
65. University of Toronto Response to *University Accountability: A Strengthened Framework*, at p. 5.

Chapter 9

12. CONCLUSION

1. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
2. Hugh Arnold, *Organizational Behaviour* (New York: McGraw-Hill, 1986).
3. Seminar on Judicial Independence and Accountability for the Canadian Judicial Council (Ottawa: March, 1993). The excerpt has been edited slightly by Dean Arnold.
4. S. 54 of the Constitution Act, 1867 provides that money bills must be government bills.
5. See Peter Hogg, "The Role of a Chief Justice in Canada" (1993) 19 *Queen's Law Journal* 248 at p. 256: "A shift to another portfolio might leave the courts with a weaker champion in Cabinet and in Parliament or the Legislature. The courts would be more exposed to competing claims on public funds, and their own level of funding might suffer."
6. Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Information Canada, 1969); see also M. L. Friedland, "Magistrates' Courts: Functioning and Facilities" (1968) 11 *Crim. L.Q.* 52.
7. Friedland, "Magistrates Courts", at p. 53.
8. *Valente* (1985) 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, [1985] 2 S.C.R. 673.
9. For an analysis of various models, see Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges" in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (The Netherlands: Martinus Nijhoff, 1985) 590 at pp. 644 *et seq.*; P. S. Millar and C. Baar, *Judicial Administration in Canada* (Montreal: McGill-Queen's U.P. and Institute of Public Administration of Canada, 1981), chapter 3.
10. *Askov* (1990) 59 C.C.C. (3d) 449, [1990] 2 S.C.R. 1199, holding that there was a violation of s. 11(b) of the Charter with respect to unreasonable delay.
11. *Civil Justice Review* (Toronto, March, 1995) at p. 114.

12. *Ibid.*, at pp. 122-3.

CHAPTER TEN: CHIEF JUSTICES AND THEIR COURTS

Chapter 10

1. INTRODUCTION

1. (1991) 64 C.C.C. (3d) 513 at p. 530, [1991] 2 S.C.R. 114. See also Lamer C.J.C.'s speech to the Canadian Institute for the Administration of Justice, Ottawa, 13 October 1994 at p. 10: "Judges are not only independent of the executive but of each other...The judiciary is necessarily a choir of soloists." And see Dickson C.J.C.'s statement in *Beauregard* (1986) 30 D.L.R. (4th) 481 at 491, [1986] 2 S.C.R. 56: "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider—be it government, pressure group, individual or even another judge—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision."
2. T. G. Zuber, *Report of the Ontario Courts Inquiry*, (Toronto, 1987) at p. 167.
3. *Ibid.*
4. See pp. 9 and 10 of speech by Mr. Justice David Marshall at Dalhousie Law School, 16 November 1992, parts of which were published in the Dalhousie Law School's *Hearsay* and reported in the *Globe and Mail*, 9 June 1993. See also a response by W. J. Anderson, a retired justice of the same court, *Globe and Mail*, 20 July 1993: "In those [fifteen] years I never encountered any such interference with assignments or the amenities of office as are alleged by Judge Marshall. Not only did I never encounter any, I neither saw nor heard of any, nor even heard rumours of any."
5. Mr. Justice J. C. Bouck, unpublished paper, "Court Reform", 4 January 1994, at pp. 2, 7 and 9.
6. Judge Timothy T. Daley of Nova Scotia, "The Duties of the Chief Judges of Provincial and Territorial Courts and their Impact on Judicial Independence", 1994, at p. 249.

Chapter 10

2. HISTORY OF CHIEF JUSTICES

1. See *Dictionary of Canadian Biography*, vol. 4 (U. of Toronto Press, 1979) at p. 50.
2. See the unpublished report, "The Status and Role of the Chief Justice in Canada", prepared for the Canadian Institute for the Administration of Justice in 1981 by Serge Segal at p. 14.
3. *Ibid.*, at pp. 30-1, 235. Osgoode was actually appointed on 31 December 1791.
4. See Daley, "The Duties of the Chief Judges", at p. 126.
5. *Report of the Ontario Royal Commission Inquiry into Civil Rights* (McRuer Report) (Ontario, 1968).
6. Provincial Court Act, R.S.B.C. 1979, c. 341, s. 6.1, as amended by S.B.C. 1981, c. 26, s. 4, and S.B.C. 1989, c. 30, s. 41. See also the Alberta legislation: Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 2(5).

7. Provincial Court Act, R.S.M. 1987, c. C275, s. 8.1(1), as amended by S.M. 1989-90, c. 34, s. 4.
8. Provincial Court Act, R.S.P.E.I. 1988, c. P-25, s. 4(1).
9. Courts of Justice Act, R.S.Q. 1977, c. T-16, s. 96.
10. Daley, at pp. 151-2. It can be argued that the Newfoundland legislation might be more narrowly construed, however, as the legislation refers only to "the general supervision and direction of the sittings of the court": Provincial Court Act, S.N. 1991, c. 15, s. 8(1).
11. *Ibid.*, at p. 170.
12. *Ibid.*, at p. 2.
13. Segal, at p. 49.
14. *Ibid.*, at p. 155.
15. Courts of Justice Act, R.S.Q. 1977, c. T-16, s. 96. See also *Report of the Quebec Task Force on Administrative Autonomy of the Courts of Justice* (1993), at p. 13 (English translation arranged by C.J.C.).
16. Supreme Court (Amendment) Act, S.B.C. 1969, c. 38, s. 18(1).
17. Supreme Court (Amendment) Act, S.B.C. 1973, c. 154, s. 2. See now, the Provincial Court Act, R.S.B.C. 1979, c. 341, s. 6.1, as amended by S.B.C. 1981, c. 26, s. 4, and S.B.C. 1989, c. 30, s. 41.
18. C. G. Geyh, "Means of Judicial Discipline other than those Prescribed by the Judicial Discipline Statute", *Research Papers of the National Commission on Judicial Discipline and Removal* (Washington, 1993) at p. 756.
19. Some judges in British Columbia, however, view this as a significant departure: see Bouck, "Court Reform".

Chapter 10

3. SOME FOREIGN MODELS

1. Russell Wheeler, *Origins of the Elements of Federal Court Governance* (Washington: Federal Judicial Center, 1992) at pp. 16-17. See also the talk by U.S. circuit chief judge Richard Arnold to the Canadian Judicial Council, 24 March 1993. See also, Russell Wheeler and Charles Nihan, *Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures* (Washington: Federal Judicial Center, 1982); Mr. Justice R. D. Nicholson, "Judicial Independence and Judicial Organisation: A Judicial Conference for Australia?" (1993) 2 *J. of Jud. Admin.* 143.
2. Wheeler, *Origins of the Elements of Federal Court Governance*, at p. 18.
3. See generally, W. Feinberg, "The Office of Chief Judge of a Federal Court of Appeals" (1984) 53 *Fordham L. Rev.* 369.
4. Mr. Justice R. E. McGarvie, "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *J. of Jud. Admin.* 3 at p. 23.

5. This new non-statutory Judges' Council in England, I am told, is playing an increasingly influential role in judicial affairs.
6. *Ibid.*, at p. 25. See also Mr. Justice R. E. McGarvie, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" (1992) 1 *J. of Jud. Admin.* 236 at p. 249; T. W. Church and P. A. Sallmann, *Governing Australia's Courts* (Victoria: Australian Institute of Judicial Administration, 1991).
7. High Court of Australia Act 1979.
8. Church and Sallmann, at pp. 41 *et seq.*

Chapter 10

4. CONCLUSION

1. David Osborne and Ted Gaebler, *Reinventing Government* (New York: Plume, 1992) at p. 259.
2. Section 12 of chapter 9.
3. Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 16.
4. See Wheeler, *Origins of the Elements of Federal Court Governance*; Chief Judge Richard Arnold, "Perspectives from the United States" in C.J.C. Seminar, 24 March 1993.
5. Jules Deschênes, *Masters in their own House* (Ottawa: Canadian Judicial Council, 1981) recommendation 192.
6. Document dated 30 June 1994, at p. 5.
7. Bouck, at p. 30.
8. For a discussion of the tenure of Chief Justices of the United States, see J. R. Vile, "The Selection and Tenure of Chief Justices" (1994) 78 *Judicature* 96 at p. 100 who concludes that "on balance the existing practice of appointing chief justices as chiefs for life at the national level is the preferable procedure."
9. Judges Act, R.S.C., c. J-1, s. 32.
10. Judges Act, R.S.C., c. J-1, s. 43.
11. Deschênes, recommendation 191, and Bouck, at p. 30.
12. Courts of Justice Statute Law Amendment Act 1994, S.O. 1994, c. 12, s. 17, amending s. 52(1) and (2).
13. I will leave it to the judiciary to sort out whether the chief justice should have full authority for assigning cases. On the one hand, one wants persons with particular expertise to take charge of certain difficult cases, and on the other, one does not want puisne judges entirely excluded from the selection process. As one member of a major Canadian court of appeal stated in a letter to me: "Chief Justices ought not to have or to exercise powers that would give them more control than puisne judges over the unfolding of the law." The Canadian Judges Conference submission to me, dated 30 June 1994, states (at p. 5): "The assignment power should not be used to achieve specific adjudicative results or objectives." My own solution would be to leave the ultimate authority in the hands of the chief, but to ensure that the chief consults with a group of judges who in general have the confidence of the court.

CHAPTER ELEVEN: APPOINTMENTS AND ELEVATION

Chapter 11

1. INTRODUCTION

1. It should be noted that the report of the Canadian Bar Association's Special Committee, *The Independence of the Judiciary in Canada* (Ottawa: Canadian Bar Foundation, 1985), also dealt with appointments. Moreover, this Report is expected to deal with the subject: see Allan Rock's comments at the Annual Meeting of the Canadian Bar Association (Robert Sheppard, *Globe and Mail*, 24 August 1994).
2. See the *Report of the National Commission on Judicial Discipline and Removal* (Washington: National Commission, August 1993) at p. 81.
3. Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges* (Winnipeg, 1989) at p. 18.
4. Ian Greene, "Judicial Accountability in Canada" in P. C. Stenning, *Accountability for Criminal Justice: Selected Essays* (U. of Toronto Press, 1995), Chapter 15.
5. Time constraints have not permitted a careful examination of appointment systems in other countries. Readers can find helpful discussions in Douglas Schmeiser, "Appointment of Judges in Other Countries" in the C.A.L.T. document, *Judicial Selection in Canada* (1987) at pp. 106 *et seq.*; Carl Baar, "Comparative Perspectives on Judicial Selection Processes" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto, 1991) at pp. 143 *et seq.*; Eleni Skordaki, *Judicial Appointments: An International Review of Existing Models* (London: Law Society, 1991); C.B.A. Report, *The Appointment of Judges in Canada* (Ottawa, 1985) at pp. 23 *et seq.* (Australia, New Zealand, France, Denmark and Israel); and H. J. Abraham, *The Judicial Process*, 6th ed. (New York: Oxford University Press, 1993). For a detailed discussion of the appointment process in France, see John Bell, "Principles and Methods of Judicial Selection in France" (1988) 61 *Southern Cal. L. Rev.* 1757; for Germany, see David Clark, "The Selection and Accountability of Judges in West Germany" (1988) 61 *Southern Cal. L. Rev.* 1795; and for Israel, see Shimon Shetreet, *Justice in Israel: A Study of the Israel Judiciary* (Netherlands: Martinus Nijhoff, 1994) at pp. 257 *et seq.*

Chapter 11

2. FEDERALLY APPOINTED JUDGES

1. Constitution Act, 1867, 30 & 31 Vict., c.3 (U.K.), set out in R.S.C. 1985, App. II.
2. *Ibid.*, s.92(14).
3. See Hon. Solicitor General Langevin, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Session, 8th Provincial Parliament of Canada, 16 February 1865, at pp. 387-8.
4. Union Act, 1840, 3-4 Victoria, c.35, set out in R.S.C. 1985, App. II.
5. William Angus, "Judicial Selection in Canada — the Historical Perspective" (1966) 3 *Canadian Legal Studies* 220 at p. 222. I am indebted to Professor Angus' thorough historical research for much of the material in this section.

6. *Ibid.*
7. Correspondence of Lieut. Governor Gordon to Edward Cardwell, 26 September 1864, as cited in G. P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland and Stewart, 1969) at p. 47.
8. *Ibid.*, at p. 46.
9. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Session, 8th Provincial Parliament of Canada, 16 February 1865, at pp. 387-8.
10. See generally, Angus, "Judicial Selection in Canada".
11. Kerr, "Judicial Appointments" (1872) 2 *Rev. Critique* 90 at p. 98, as cited in Angus, "Judicial Selection in Canada", at pp. 224-5.
12. "Supreme Court Changes" (1895) 31 *Can. L. J.* 647 at p. 648, as quoted in Angus, at p. 232.
13. (1904) 40 *Can. L. J.* 761, as quoted in Angus, at p. 233.
14. (1918) 3 *Can. Bar Proc.* 175, as quoted in Angus, at p. 237.
15. Presidential Address, (1930) 8 *Can. B. Rev.* 557 at 560, as quoted in Angus, at p. 240.
16. *House of Commons Debates*, 17 May 1932, at p. 2999.
17. See Department of Justice, *A New Judicial Appointments Process* (Ottawa, 1988) at pp. 1-2.
18. Angus, at p. 242.
19. Peter Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at p. 115.
20. See John Willis, "Methods of Appointing Judges—An Introduction" (1966) 3 *Canadian Legal Studies* 216 at p. 217.
21. Russell, *The Judiciary in Canada*, at p. 118.
22. See Angus, at p. 251; and Russell, *The Judiciary in Canada*, at p. 118; and Ed Ratushny, "Judicial Appointments: The Lang Legacy" in A. M. Linden, ed., *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) at pp. 31 *et seq.*
23. See chapter five.
24. See John Willis, "Methods of Appointing Judges—An Introduction" (1966) 3 *Canadian Legal Studies* 216.
25. *House of Commons Debates*, 30 March 1966, at p. 3629. See also the *Globe and Mail*, 19 May 1965: "The result [of the present system] is a truly disgusting performance of influence peddling, furtive lobbying and political machination of the lowest order as the carpetbaggers vie for favour."
26. See William Kaplan's forthcoming biography of Leo Landreville, *Bad Judgment*, discussed in chapter 5 of this Report.
27. *House of Commons Debates*, 16 October 1968, at p. 1221; Ratushny, "Judicial Appointments"; Russell, *The Judiciary in Canada*, at p. 120.

28. John Gilbert, *House of Commons Debates*, 14 June 1971, at p. 6673, who was later rewarded with his own appointment.
29. Ratushny, "Judicial Appointments", at p. 36.
30. *Ibid.*, at p. 35.
31. William Angus, "Comment" in A. M. Linden, ed., *The Canadian Judiciary*, at p. 53.
32. *House of Commons Debates*, 1 December 1980, at p. 5223.
33. *House of Commons Debates*, 6 March 1981, at p. 7995.
34. *House of Commons Debates*, 28 June 1983, at p. 26886.
35. Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed. (U. of Toronto Press, 1993); W. R. Lederman, "Current Proposals for Reform of the Supreme Court of Canada" (1979) 58 *Can. B. Rev.* 687.
36. Lederman, "Current Proposals", at p. 700.
37. See K. E. Swinton and C. J. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988); A. W. MacKay and R. W. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution" in C. Beckton and A. W. MacKay, *The Courts and the Charter* (Background papers to the Macdonald Commission on Economic Union) (U. of Toronto Press, 1985) at pp. 37 *et seq.*; Keith Banting, "Federalism and the Supreme Court of Canada: The Competing Bases of Legitimation" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (1991) at pp. 31 *et seq.*; Alan Cairns, "Who Should the Judges Be? Canadian Debates about the Composition of a Final Court of Appeal" in H. N. Scheiber, ed., *North American and Comparative Federalism* (University of California, Berkeley, Institute of Governmental Studies Press, 1992) at pp. 57 *et seq.*
38. K. Swinton, "Competing Visions of Constitutionalism: Of Federalism and Rights" in Swinton and Rogerson, *Competing Constitutional Visions*, at pp. 279 *et seq.*
39. Cairns, "Who Should the Judges Be?", at p. 75.
40. Russell, *The Judiciary in Canada*, at p. 120.
41. *Ibid.*
42. (Ottawa: Canadian Bar Foundation, 1985).
43. *Ibid.*, at p. 9.
44. *Ibid.*, at p. 63.
45. *Ibid.*, at p. 67.
46. *Ibid.*
47. Documentation on the C.A.L.T. discussions can be found in *Judicial Selection in Canada: Discussion Papers and Reports* (privately distributed, 1987).
48. C.A.L.T. Special Committee on Judicial Appointments, in *Judicial Selection in Canada*, at p. 208.

49. *Ibid.*, at p. 209.
50. *Ibid.*, at p. 206. The Committee envisaged larger committees in the more populous provinces.
51. *The Appointment of Judges in Canada*, at pp. 66-7.
52. *Judicial Selection in Canada*, at pp. 210-11.
53. Including other s.101 courts: see C.B.A. Report, at pp. 67-8; C.A.L.T. Report, at p. 211.
54. C.A.L.T. Report, at p. 213.
55. See the 1986 Report of the C.A.L.T. Special Committee on Judicial Appointments set out in *Judicial Selection in Canada*, at pp. 217 *et seq.* Professor Angus' letter is at p. 263. The C.A.L.T. Annual Meeting formally approved in principle the C.B.A. proposal, but without the phrase "without reservation": see p. 270.
56. *Ibid.*, at p. 264.
57. *Ibid.*, at pp. 166-7.
58. Russell and Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 *U. of Toronto L.J.* 4 at p. 33.
59. *Ibid.*, at p. 19.
60. Department of Justice, *A New Judicial Appointments Process* (Ottawa, 1988).
61. The committees are described on pp. 12-14 of the Department of Justice document, *supra*.
62. *Ibid.*, at p. 13.
63. Russell and Ziegel, "Federal Judicial Appointments," at p. 7.
64. Justice Information document, Federal Judicial Appointments (1991).
65. *Ibid.*, at p. 4.
66. C.B.A. Submission to the Minister of Justice on the Federal Judicial Appointments Process (Ottawa: November, 1993) at p. 7.
67. Speech to Canadian Bar Association, Toronto, August, 1994.
68. The changes outlined in this section are set out in letters dated March, 1994 to persons who are charged with nominating individuals to committees.
69. *Ibid.*
70. *Ibid.*
71. *Ibid.*
72. Material obtained from the Commissioner for Federal Judicial Affairs.
73. See Guy Goulard, Commissioner for Federal Judicial Affairs, National Judicial Institute's *Bulletin*, April, 1995 at p. 6.

74. *Ibid.*

Chapter 11

3. PROVINCIAL APPOINTMENTS

1. In the territories, it is the Commissioner or the Commissioner in the executive council who makes the appointment. For convenience, I have not generally made specific reference to the territories in the text, but simply refer to provincial appointments.
2. See generally, Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges* (Winnipeg, 1989) at pp. 18 *et seq.*; Peter Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at pp. 124 *et seq.*; John Brierley, "Provincially Appointed Judges" in C.A.L.T. Special Committee on the Appointment of Judges, *Judicial Selection in Canada* (1987) at pp. 85 *et seq.*
3. See Russell, *The Judiciary in Canada*, at p. 125.
4. *Royal Commission of Inquiry into Civil Rights*, Report No. 1, Vol. 2 (Toronto: Queen's Printer, 1968) at p. 539. See also John Hogarth, *Sentencing as a Human Process* (U. of Toronto Press, 1971) at p. 64.
5. Provincial Courts Act, S.O. 1968, c.103, s.8(1)(a).
6. See the Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges*, at p. 24.
7. See *ibid.*, at pp. 27-28; Judge L. S. Goulet, "The B.C. Experience in the Appointment Process" in C.A.L.T., *Judicial Selection in Canada*, 164 at p. 167.
8. Russell, *The Judiciary in Canada*, at p. 128.
9. See Patrice Garant, "La sélection des juges provinciaux au Québec" in C.A.L.T., *Judicial Selection in Canada*, at pp. 94 *et seq.*; Manitoba Law Reform Commission Report, at pp. 25-27. Regulations were passed under the Courts of Justice Act: see Regulation respecting the procedure for the selection of persons apt for appointment as judges, R.R.Q. 1981, c.T-16, r.5.
10. Courts of Justice Act, R.S.Q., c.T-16, s.248.
11. S.M. 1989-90, c.34, s.3; see Provincial Court Act, C.C.S.M. c. C275.
12. Manitoba Law Reform Commission Report, at pp. 18 *et seq.*
13. *Ibid.*, at pp. 32-33.
14. *Ibid.*, at pp. 33-34.
15. *Ibid.*, at p. 37.
16. *Ibid.*, at pp. 37-38; but further names can be requested if the candidates selected are unable to accept the appointment.
17. S.3.1(2).

18. See Manitoba Law Reform Commission Report, at p. 22. I have taken the description in the text from a document dated April 15, 1991, "The Judicial Appointments' Review and Consultation Process".
19. *Ibid.*, at p. 1.
20. *Ibid.*, at p. 4.
21. Bill 136, S.O. 1994, c.12, s.43. The Committee and its development is described in the *Interim Report* of the Judicial Appointments Advisory Committee (1990); the *Final Report and Recommendations* of the Committee (1992); and the *Annual Report* of the Committee (1994).
22. *Ontario Legislative Debates*, 15 December 1988, at p. 6835.
23. *Final Report and Recommendations*, at p. iii.
24. S.O. 1994, c.12, s.43(2).
25. *Ibid.*, s.43(9).
26. *Ibid.*, s.43(11).
27. *Ibid.*, s.43(12).
28. *Annual Report to 31 December 1993*, at p. 1.
29. *Ibid.*, at p. 10.
30. *Final Report and Recommendations* (1992), at p. 15.
31. *Annual Report*, at p. 14.
32. *Final Report*, at pp. 6-7.
33. C.B.A.-Ontario, Submission to the Attorney General of Ontario re the Recommendations of the Judicial Appointments Advisory Committee (Toronto, 1993) at pp. 6-7.
34. S.O., 1994, c.12, s.43(9)3. The Committee's criteria are set out in the *Interim Report* (1990) at pp. 17-21, and as Appendix 2 to the *Final Report*.
35. C.B.A.-Ontario Submission, at p. 9.
36. *Ibid.*, at p. 13.

Chapter 11

4. ENGLAND

1. Statement by Sir Thomas Legg, Bar Conference Panel Discussion on Judicial Appointments, 2 October 1993. There was a fourfold increase in the number of judges between 1970 and 1992: see the report by Justice, *The Judiciary in England and Wales* (Robert Stevens, chair) (London: Justice, 1992) at p. 6.
2. See Robert Stevens, *The Independence of the Judiciary* (Oxford: Clarendon Press, 1993) at p. 22.

3. Cited in Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland, 1976) at p. 71.
4. See, e.g., David Pannick, *Judges* (Oxford University Press, 1987) at p. 66; Lord Griffiths, "Judicial Independence Abroad" [1989] *Judges' Journal* 28 at p. 32.
5. Justice, at p. 6.
6. Solicitors have been eligible for Circuit judgeships since the mid-1970s and to the High Court since 1990, but by the end of 1993 only one had moved up to the High Court; see Joshua Rozenberg, *The Search for Justice* (London: Hodder and Stoughton, 1994) at p. 81.
7. Pannick, *Judges*, at p. 59.
8. Rozenberg, at p. 84.
9. *Ibid.*, at p. 86.
10. Pannick, *Judges*, at p. 52.
11. Justice, at p. 2. A 1972 report by the same body had recommended an A.B.A. or pre-1988 C.B.A.-style advisory review process: see Justice, *The Judiciary* (Peter Webster, chair) (London: Stevens, 1972) at pp. 30-1.
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*, at p. 12.
15. *Ibid.*, at pp. 11-13.
16. *Ibid.*, at p. 28.
17. Lord Chancellor's Speech for the Dinner for Her Majesty's Judges, 7 July 1993. See also, to the same effect, the statement by Sir Thomas Legg at the Bar Conference Panel Discussion on Judicial Appointments, 2 October 1993. Lord Hailsham had published a pamphlet in 1986, *Judicial Appointments: The Lord Chancellor's Policies and Procedures*, and Lord Mackay published an updated version in 1990.
18. Lord Chancellor's Speech, *ibid.*
19. *Ibid.*
20. Judicial Appointments Group, Lord Chancellor's Department.
21. *Ibid.*, at pp. 17 *et seq.*
22. *Ibid.*, at p. 3.
23. *Ibid.*, at p. 4.
24. *Ibid.*, at p. 5.
25. The chair is Sir Ivan Lawrence Q.C., M.P.: see *Solicitors Journal*, 27 January 1995, at p. 56.
26. *Ibid.*

27. Rozenberg, at p. 81.
28. See *Access to Justice* (1995). The Commission will take over work currently done in the Lord Chancellor's Department and "alone will have responsibility for the selection, training and career development of judges."
29. Justice, at p. 20.
30. *Judicial Appointments: the Lord Chancellor's Policies and Procedures* (1990) at p. 8. See also Jacob Ziegel, "Federal Judicial Appointments in Canada: The Time is Ripe for Change" (1987) 37 *U.T.L.J.* 1 at p. 20.
31. Lord Chancellor's Speech, 7 July 1993.
32. Statement by Sir Thomas Legg, 2 October 1993, at p. 5.
33. *Ibid.*, at p. 4. Recorders are paid slightly more than £300 a day (£346 as of 1 April 1995) and Assistant Recorders somewhat less (£270 as of 1 April 1995).
34. *Judicial Appointments: the Lord Chancellor's Policies and Procedures* (1990) at pp. 8-14, describing these and other part-time positions, such as acting stipendiary magistrates.
35. Conversation with an official of the Lord Chancellor's Department, 24 April 1994, who stated that almost half the High Court appointments in the past year were from the Circuit Bench.
36. *Ibid.*

Chapter 11

5. UNITED STATES

1. See the A.B.A. pamphlet, *Standing Committee on Federal Judiciary* (A.B.A., 1991) at p. 3.
2. Article II, section 2. Lower courts were added later. Article I, section 8 of the Constitution gave Congress the power to "constitute tribunals inferior to the supreme Court."
3. Article II, section 1. See chapter three of this Report.
4. See Albert Melone, "The Senate's confirmation role in Supreme Court nominations and the politics of ideology versus impartiality" (1991) 75 *Judicature* 68 at p. 70; James Gauch, "The Intended Role of the Senate in Supreme Court Appointments" (1989) 56 *U. Chicago L. Rev.* 337.
5. Hamilton, *The Federalist*, No. 76, as set out in Melone, at p. 70.
6. There are a great many recent articles on the Senate confirmation process. A very recent survey is William Ross, "The Supreme Court Appointment Process: A Search for a Synthesis" (1994) 57 *Albany L. Rev.* 991. Other helpful articles are Jonathan Entin, "The Confirmation Process and the Quality of Political Debate" (1993) 11 *Yale Law and Policy Review* 407; Stephen Carter, "The Confirmation Mess, Continued" (1993) 62 *U. of Cincinnati L. Rev.* 75 and other articles by Carter in (1991) 69 *Texas L. Rev.* 759, (1990) 84 *Northwestern U. L. Rev.* 962, and (1988) 101 *Harvard L. Rev.* 1185; Albert Melone, "The Senate's confirmation role" (1991) 75 *Judicature* 68; Robert Nagel, "Advice, Consent and Influence" (1990) 84 *Northwestern U. L. Rev.* 858; and Paul Freund, "Appointment of Justices: Some Historical Perspectives" (1988) 101 *Harvard L. Rev.* 1146.

7. See Calvin Massey, "Getting There: A Brief History of the Politics of Supreme Court Appointments" (1991) 19 *Hastings Const. L. Q.* 1. One of the rejected nominees was New York lawyer William Hornblower, who was rejected at the insistence of Senator David Hill who wanted to control patronage in New York: *ibid.*, at p. 4. Both Hornblower and Hill are principal characters, it would be remiss not to point out, in M. L. Friedland, *The Death of Old Man Rice: A True Story of Criminal Justice in America* (U. of Toronto Press and N.Y.U. Press, 1994).
8. See Robert Nagel, "Advice, Consent, and Influence," at p. 859; John Maltese, "The Selling of Clement Haynsworth: Politics and the Confirmation of Supreme Court Justices" (1989) 72 *Judicature* 338 at p. 339.
9. See, e.g., Stephen Carter, "The Confirmation Mess" (1988) 101 *Harv. L. Rev.* 1185.
10. Association of the Bar of the City of New York, *Report of the Ad Hoc Committee on the Senate Confirmation Process* (1992) at p. 552, as quoted in Ross, "The Supreme Court Appointment Process," at p. 997.
11. Mark Silverstein, "The People, the Senate and the Court: the Democratization of the Judicial Confirmation System" (1992) 9 *Const. Commentary* 41 at p. 58.
12. Ross, "The Supreme Court Appointment Process," at p. 1015.
13. *Ibid.*, at p. 1041.
14. *Ibid.*, at p. 1040.
15. See Daniel Meador, *American Courts* (St. Paul, Minn.: West, 1991) at p. 57. See also C.B.A., *The Appointment of Judges in Canada* (Ottawa, 1985) at p. 20.
16. Meador, at p. 57.
17. There are 15 members, including two from the large Ninth Circuit and one member-at-large: see the A.B.A. pamphlet, *Standing Committee on Federal Judiciary* (A.B.A., 1991) at p. 1.
18. *Ibid.*, at p. 4. This informal report is conveyed to the Attorney General's office. A final report is only prepared if the Attorney General so requests.
19. *Ibid.*, at p. 8.
20. *Ibid.*, at p. 7.
21. Lawrence Silberman, "The American Bar Association and Judicial Nominations" (1991) 59 *George Washington L. Rev.* 1092 at p. 1099.
22. *Ibid.*
23. See generally, Lyle Warrick, *Judicial Selection in the United States: A Compendium of Provisions* (Chicago: American Judicature Society, 1993) at pp. 3-6; Harry Stumpf and John Culver, *The Politics of State Courts* (New York: Longman, 1992) at pp. 37 *et seq.*
24. Stumpf and Culver, at p. 38.
25. Warrick, at p. 3.
26. *Ibid.*, at pp. 3-4.

27. Reprinted in (1937) 20 *Journal of the American Judicature Society* 178.
28. Warrick, at p. 4. See the book by the Judicature Society's Director of Drafting, Albert Kales, *Unpopular Government in the United States* (U. of Chicago Press, 1914) at pp. 225 *et seq.*
29. *Ibid.*, at p. 5.
30. See generally, Norman Krivosha, "In celebration of the 50th anniversary of merit selection" (1990) 74 *Judicature* 128; Carl Baar, "Judicial Appointments and the Quality of Adjudication: the American Experience in a Canadian Perspective" (1986) *La Revue Juridique Thémis* 1.
31. Warrick, at p. 5.
32. *Ibid.*
33. See Stumpf and Culver, *The Politics of State Courts*, at p. 41.
34. See J. T. Wold and J. H. Culver, "The defeat of the California justices" (1987) 7 *Judicature* 348.
35. See L. T. Aspin and W. K. Hall, "Retention elections and judicial behavior" (1994) 77 *Judicature* 306.
36. Stumpf and Culver, at p. 42. See also B. Henschen *et al.* "Judicial nominating commissioners: a national profile" (1990) 73 *Judicature* 328 at p. 334: "Our findings suggest that judicial nominating commissions are politically active."
37. Warrick, at p. 5.
38. See Krivosha, "In celebration of the 50th anniversary of merit selection", at p. 132.
39. See Stumpf and Culver, at p. 44.
40. Warrick, at p. 5.
41. Stumpf and Culver, at p. 42.
42. Warrick, at p. 17: Maine, New Hampshire, New Jersey, and Rhode Island.
43. Stumpf and Culver, at p. 43.
44. *Ibid.*, at p. 48.
45. *Ibid.*, at p. 50.
46. The "life terms" are to the age of 70: see American Judicature Society, *Judicial Selection in the States* (1986, revised 1993).

Chapter 11

6. CONCLUSION

1. Chapter 10.
2. Frederick Lawton in a book review in [1994] *Cambridge L. J.* at p. 389. See also Mr. Justice R. E. McGarvie, "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence" (1992) 1 *J. of Jud. Admin.* 236 at p. 255: "Government power to promote

judges has been seen as having potential to detract from judicial independence.” The same point is made in the C.B.A. report, *The Independence of the Judiciary* (Ottawa, 1985) at p. 44, where a concern is expressed about the danger of inducing “judges to tailor their judgments to please the authorities in an effort to obtain promotion.”

3. See the Department of Justice pamphlet, “Federal Judicial Appointments” (Ottawa, 1991) at p. 4: “In the case of elevations, the government will rely mainly upon consultations between the Minister of Justice and the chief justice and the attorney general concerned.”
4. *Ibid.*
5. Correspondence with the Canadian Judicial Council, September, 1991.
6. Correspondence with the Canadian Judicial Council, March, 1994.
7. C.B.A. Submission to the Minister of Justice on the Federal Judicial Appointments Process (Ottawa, 1993) at p. 12.
8. See Peter Russell, “Meech Lake and the Supreme Court” in K. E. Swinton and C. J. Rogerson, *Competing Constitutional Visions* (Toronto: Carswell, 1988) at pp. 97 *et seq.*
9. Section 19 of the Charlottetown Accord stated: “The Constitution should require the federal government to name judges from lists submitted by the governments of the provinces and territories. A provision should be made in the Constitution for the appointment of interim judges if a list is not submitted on a timely basis or no candidate is acceptable.” See Peter Russell, *Constitutional Odyssey*, 2nd ed., (U. of Toronto Press, 1993) at p. 246.
10. For various proposals, see, e.g., W. R. Lederman, “Current Proposals for Reform of the Supreme Court of Canada” (1979) 57 *Can. B. Rev.* 687; A. W. MacKay and R. W. Bauman, “The Supreme Court of Canada: Reform Implications for an Emerging National Institution” in C. F. Beckett and A. W. MacKay, *The Courts and the Charter* (U. of Toronto Press, 1985) at pp. 37 *et seq.*; C.B.A., *The Appointment of Judges in Canada* (Ottawa, 1985) at pp. 65 *et seq.*; C.A.L.T., *Judicial Selection in Canada* (1987) at pp. 212 *et seq.*; Peter Russell, “Meech Lake and the Supreme Court” at pp. 97 *et seq.*; Claire L’Heureux-Dubé, “Nomination of Supreme Court Judges: Some Issues for Canada” (1991) 20 *Manitoba L. Rev.* 600; and L’Heureux-Dubé, “La nomination des juges: une perspective” (1994) 25 *Revue Générale de Droit* 295.
11. See, e.g., Bryan Williams, “Say ‘No’ to Senate Confirmation of Supreme Court of Canada Appointments” (1992) 50 *The Advocate* 207; Peter Russell, “Meech Lake and the Supreme Court,” at p. 110.
12. See chapter 7 of this Report.
13. Statistics supplied by Guy Goulard, the Commissioner for Federal Judicial Affairs. These figures do not include applications by provincial court judges.
14. Statistics supplied by the Judicial Affairs Unit, Department of Justice, May, 1995.
15. *Ibid.* Peter Russell would select only from the “highly recommended” category. In a letter to Allan Rock, 10 May 1994, he wrote: “First, if a pro-active recruitment program is in place, it should not be necessary to go below the ‘highly recommended’ category to develop a judiciary more reflective of our social diversity. Second, every knowledgeable observer of the federal process with whom I have talked believes that partisan politics is frequently the reason for favouring a ‘recommended’ candidate over a ‘highly recommended’ candidate.”

16. We do not collect as much background information as one would expect. Note also the background checks conducted for U.S. federal judges by the F.B.I.: see the *Report of the National Commission on Judicial Discipline and Removal* (Washington, 1993) at pp. 81-82. Note also that in England, an offer of appointment is "conditional on the satisfactory outcome of a medical examination." See the Lord Chancellor's Department, *Developments in Judicial Appointments Procedures* (London, 1994) at p. 17. These are both sensible procedures to be followed.
17. See Judicial Appointments Advisory Committee, *Final Report and Recommendations* (1992) at pp. 37 *et seq.*; Lord Chancellor's Department, *Developments in Judicial Appointments Procedures* (1994) at pp. 19 *et seq.* The Minister of Justice, Allan Rock, has stated (March, 1994) that he intends "to establish more detailed written guidelines."
18. *Annual Report for the Period from 1 July 1992 to 31 December 1993* (1994).
19. See Jacob Ziegel, "Federal Judicial Appointments" (1987) 37 *U. of Toronto L.J.* 1 at pp. 19 *et seq.* We are not discussing probationary appointments, which would likely be struck down by the Supreme Court.
20. *Lippé* (1990) 64 C.C.C.(3d) 513, [1991] 2 S.C.R. 114.

CHAPTER TWELVE: CONCLUSION

1. Senator Henry A. N. Kaulbach, Hansard, *Senate Debates*, 12 July 1894, at p. 702.
2. See Senator Arthur Meighen in the *Senate Debates*, 24 May 1932, at p. 457: "a judge is in no sense under the direction of the Government...The judge is in a place apart."

APPENDIX A

U.N. BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

(endorsed by the U.N. General Assembly, 1985)

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

APPENDIX B

AMERICAN BAR ASSOCIATION'S 1990 MODEL CODE OF JUDICIAL CONDUCT¹

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

¹ Only the Commentary to Canon 3 has been included.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which the judge is in fact disqualified.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Judicial bias, as perceived by parties or lawyers in the proceeding, jurors, the media and others, may be manifested by nonverbal communication such as facial expression and body language as well as by words. A judge must be alert to avoid such prejudicial behavior.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge with the consent of the parties from conferring separately with the parties and lawyers in an effort to mediate or settle matters pending before the judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications received regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication must be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its

outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge

shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities.

(1) A judge having knowledge that another judge has committed a violation of this Code should take appropriate action. If the violation raises a substantial question as to the other judge's fitness for office, the judge shall inform the appropriate authority.

(2) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. If the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the judge shall inform the appropriate authority.

(3) Acts of a judge in the discharge of disciplinary responsibilities imposed by this Section 3D are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm

appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows that he or she, individually, or as a fiduciary, or the judge's spouse, parent or child has an economic interest in the subject matter in controversy or in a party to the proceeding or any other more than de minimis interest that could be substantially affected by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CANON 4

**A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL
ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH
JUDICIAL OBLIGATIONS**

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

B. **Avocational Activities.** A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

C. **Governmental, Civic or Charitable Activities.**

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be engaged frequently in adversary proceedings in any court.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial Activities.

(1) A judge shall not engage in financial and business dealing that:

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family, or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept or knowingly permit a member of the judge's family residing in the judge's household to accept a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) A gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,

H. Compensation, Reimbursement and Reporting.

(1) Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

(2) Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law.

I. Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Section 3E and 3F, or as otherwise required by law.

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. All Judges and Candidates.

(1) Except as authorized in Sections 5B(2), 5C(1) and 5C(3), a judge or a candidate for election or appointment to judicial office shall not:

- (a) act as a leader or hold an office in a political organization;
- (b) publicly endorse or publicly oppose another candidate for public office;

- (c) make speeches on behalf of a political organization;
- (d) attend political gatherings; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign from judicial office upon becoming a candidate for a non-judicial office either in a primary or in a general election except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate, including an incumbent judge who is a candidate, for a judicial office:

(a) shall maintain the dignity appropriate to judicial office, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5C(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases or controversies that are likely to come before the court; or

(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).

B. Candidates Seeking Appointive Judicial Office.

(1) A candidate for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) Unless otherwise prohibited by law, a non-judge candidate for appointment to judicial office may:

- (a) retain an office in a political organization,
- (b) attend political gatherings, and
- (c) continue to pay ordinary assessment and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

C. Judges and Candidates Subject to Public Election.

(1) A judge or a candidate subject to public election [except for retention elections] may, except as prohibited by law:

- (a) purchase tickets for and attend political gatherings;
- (b) speak to such gatherings on his or her own behalf when a candidate for election;
- (c) identify himself or herself as a member of a political party;
- (d) contribute to a political party or organization; and
- (e) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

(2) A candidate shall not personally solicit or accept campaign contributions or solicit publicly stated support. A candidate may, however, establish committees of responsible persons to solicit and accept reasonable campaign contributions, to manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

(3) Except as prohibited by law, a candidate for judicial office in a public election [except in retention elections] may permit the candidate's name: (a) to be listed on election materials along with the names of other candidates for elective public office, and (b) to appear in promotion of the ticket.

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

E. Applicability. Canon 5 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to [Rule 8.2(b) of the ABA Model Rules of Professional Conduct]. (An adopting jurisdiction should substitute a reference to its applicable rule.)

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